DOCKET

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February 17, 1984

Title: Paul Kavanaugh, Superintendent, Blackburn Correctional Complex and David L. Armstrong, Attorney General, Petitioners
v.
Keith E. Lucey

Court: United States Court of Appeals for the Sixth Circuit

Counsel for petitioner: Henry, J. Gerald

Counsel for respondent: Radigan, William P.

Entry	Date	Note	Proceedings and Orders
1	Feb 17 1984	G	Petition for writ of certiorari filed.
2	Mar 5 1984		Application for stay filed and order granting a temporary stay by Justice O'Connor on 3/7/84 (A-711).
3	Mar 7 1984		Response requested -Due March 14, 1984.
4	Mar 14 1984		Response received.
5	Mar 14 1984		Stay granted by Justice O'Connor.
6	Mar 21 1984		DISTRIBUTED. April 13, 1984
7	Mar 22 1984	X	Brief of respondent Keith E. Lucey in opposition filed.
8	Mar 22 1984	G	Motion of respondent for leave to proceed in forma pauperis filed.
9	Apr 16 1984		Motion of respondent for leave to proceed in forma pauperis GRANTED.
11	Apr 16 1984		REDISTRIBUTED. April 20, 1984
12	Apr 23 1984		Petition GRANTED.
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14	May 17 1984		Order extending time to file brief of petitioner on the merits until June 18, 1984.
17	Jun 14 1984		Brief of petitioner Kavanaugh, Supt., et al. filed.
18	Jun 14 1984		Joint appendix filed.
19	Jun 27 1984		Record filed.
20	Jun 27 1984		Certified copy of joint appendix, C.A. proceedings and original record received.
21	Jul 13 1984		Lodging received.
22	Jul 14 1984		Brief of respondent Keith E. Lucey filed.
23	Aug 8 1984		CIRCULATED.
24	Aug 10 1984		SET FOR ARGUMENT. Wednesday, October 10, 1984. (2nd case)
25	Sep 18 1984	X	Reply brief of petitioners Kavanaugh, Supt., et al. filed.
26	Sep 17 1984		Record filed.
27	Sep 17 1984		Lower Court's briefs received.
28	Oct 10 1984		ARGUED.

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PETITION FOR WRIT OF CERTIORARI

83 - 1378

No.

Office - Supreme Court, U.S.
FILED
FEB 17 1984
ALEXANDER L. STEVAS,
CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1983

PAUL KAVANAUGH, Superintendent, Blackburn Correctional Complex, and
DAVID L. ARMSTONG, Attorney General - Petitioners

versus

KEITH E. LUCEY . . . . . Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR PETITIONERS, WITH APPENDIX

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The petitioners pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit rendered January 12, 1984. The mandate therein has been stayed.

THE QUESTION PRESENTED FOR REVIEW

Did Dismissal by the Court of Appeals of Kentucky of Respondent's State Appeal, Pursuant to Neutral Procedural Rule Which Operated Neutrally Upon Appellate Counsel's Default, Violate Any Part of the Constitution of the United States?

Specifically, Is There a Constitutionally Created Right to Effective Assistance of Appellate Counsel as There Is for Trial Counsel? If So, Does Dismissal of an Appeal Implicate Effective Assistance of Appellate Counsel?

PARTIES TO THE PROCEEDING

All the parties to this proceeding are set forth in the caption of this case.

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No. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1983

PAUL KAVANAUGH, Superintendent, Blackburn Correctional Complex, and
DAVID L. ARMSTRONG, Attorney General - - - - - - - - *Petitioners*

v.

KEITH E. LUCEY - - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REFERENCE TO OPINIONS

The United States Court of Appeals for the Sixth Circuit has rendered two opinions in this matter. The most recent opinion was decided on January 12, 1984, and is styled Keith E. Lucey v. Paul Kavanaugh, Supt., et al., No. 82-5596. This opinion may be found at Appendix 1a-6a, and such opinion is to be published at Lucey v. Kavanaugh, —— F. 2d —— (6th Cir. 1984). The judgment and memorandum opinion from which such appeal was taken are from the United States District Court for the Eastern District of Kentucky at Lexington, entered September 10, 1982. Such judgment and memorandum opinion may be found at Appendix 7a-10a.

The first opinion of the United States Court of Appeals for the Sixth Circuit in this matter was rendered April 2, 1981, and was styled Keith E. Lucey v. William Seabold, Superintendent, Blackburn Correctional Complex, No. 79-3752, and may be found at Appendix 11a-12a. Such opinion is published at Lucey v. Seabold, 645 F. 2d 547 (6th Cir. 1981).

First appeal was from a judgment of the United States District Court for the Eastern District of Kentucky at Lexington, dated November 6, 1979. Such judgment may be found at Appendix 13a-14a.

STATEMENT OF JURISDICTION

The filing and entry date of the opinion of the United States Court of Appeals for the Sixth Circuit of which review is sought in this Court is January 12, 1984. That appellate opinion, which has been stayed until March 7, 1984, resulted from a civil appeal from a habeas corpus proceeding in the District Court.

No rehearing was sought by any party.

Jurisdiction is conferred upon this Court to review by writ of certiorari the appellate opinion in question by 28 U.S.C. § 2101(c) and 28 U.S.C. § 1254(1). This petition is timely presented.

This Court should grant the writ of certiorari under the authority of Rules 17.1(a) and (c) of this Court.

Rule 17.1(a). The United States Court of Appeals for the Sixth Circuit has decided a Constitutional question in a way in conflict with the Supreme Court of Kentucky, a court of last resort, and with the Constitution of Kentucky, thereby casting doubt on the ability

of Kentucky's appellate courts to dismiss Kentucky appeals based upon procedural default of appellate counsel. In so doing, the Sixth Circuit has so departed from this Court's settled opinion authority regarding state-court appeals, and from this Court's rules authority, and from this Court's principles of comity and federalism, as to call for this Court's supervision to resolve the matter and to restore this Court's Constitutional authority.

Rule 17.1(c). The United States Court of Appeals for the Sixth Circuit has decided a nationally important question which involves the power of state appellate courts over state appeals procedures in direct conflict with *McKane* v. *Durston*, 153 U. S. 684 (1894), *Powell* v. *Alabama*, 287 U. S. 45 (1932), *Ross* v. *Moffitt*, 417 U. S. 600 (1974), *Francis* v. *Henderson*, 425 U. S. 536 (1976), *Abney* v. *United States*, 431 U. S. 651 (1977), and the principles embodied in Rules 16.1 and 33.7 of this Court and Rule 31(c) of the Federal Rules of Appellate Procedure.

As a practical matter, we have been told that courts of the United States Constitutionally can dismiss appeals but courts of the states Constitutionally cannot dismiss appeals.

This Court should settle such challenge to its authority and to the Constitution, and should settle the challenge to the Supreme Court of Kentucky and to the Constitution of Kentucky, as well as the challenge to the authority of appellate courts of all the states of the union.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners submit that there is no Constitutional authority to justify the result of the United States Court of Appeals for the Sixth Circuit. Such absence of authority involves reference to:

> The Sixth Amendment, Constitution of the United States.
>
> The Fourteenth Amendment, Constitution of the United States.

The full text of such authority is set forth at Appendix 23a-24a.

STATEMENT OF THE CASE

In the District Court, respondent Lucey invoked federal jurisdiction under 28 U.S.C. § 2254.

Petitioners accept the facts as set forth by the District Court and quoted by the Sixth Circuit in its second opinion:[1]

"Petitioner (Lucey), following his conviction in the Circuit Court of Madison County, Kentucky of the offenses of trafficking in a Schedule I Controlled Substance (LSD) and trafficking in a Schedule II Controlled Substance (cocaine), was sentenced to periods of confinement of five years and ten years, to be served concurrently. He sought to collaterally attack the

[1]Petitioners do not accept the conclusions of the Courts below, and do not accept the authority used to reach such conclusions. Petitioners accept only the historical facts which show how Mr. Lucey came to the District Court.

legality of his confinement by the filing of a Petition for Writ of Habeas Corpus, claiming denial of his Constitutional right to the effective assistance of counsel on appeal. In a Judgment entered on November 6, 1979, this Court adopted the Magistrate's Report and Recommendation which stated that 'the petitioner was denied the effective assistance of counsel on appeal when his retained attorney failed to file a Statement of Appeal, thereby resulting in the dismissal of the petitioner's appeal.' The petitioner was granted a conditional Writ of Habeas Corpus.

"Upon appeal, the United States Court of Appeals for the Sixth Circuit rendered a decision on April 2, 1981 in which the petitioner's cause was remanded to this Court for the purpose of determining whether the dismissal of the petitioner's state appeal constituted a denial of equal protection of law.

"In a subsequent hearing before this Court, counsel for both parties agreed an evidentiary hearing was unnecessary. A stipulation was filed wherein the parties stated that no equal protection issue exists in this action.[2]

"On March 19, 1982, the petitioner filed a motion requesting the reissuance of the conditional Writ of Habeas Corpus heretofore granted. The sole issue upon consideration of said motion is whether the petitioner was denied his due process right to the effective assistance of counsel on appeal when his state appeal

[2]Prior to its remand, the Sixth Circuit had been told explicitly by the parties that no equal protection issue existed. Accordingly, its first decision to remand appears to be inexplicable.

was dismissed because of a procedural error of his attorney.

"The Sixth Circuit Court of Appeals has recognized a due process right to the effective assistance of appellate counsel. *Gilbert* v. *Sowders*, 646 F. 2d 1146 (6th Cir. 1981); *Cleaver* v. *Bordenkercher*, 634 F. 2d 1010 (6th Cir. 1980).

• • •

"In the instant case, the failure of petitioner's attorney to file a Statement of Appeal resulting in the foreclosure of state appellate review denied him the effective assistance of counsel. *Beasley* v. *United States*, 491 F. 2d 687 (6th Cir. 1974). Accordingly, the petitioner's motion for reissuance of a conditional Writ of Habeas Corpus must be, and the same is, hereby sustained. A Judgment will this day be entered directing that a Writ of Habeas Corpus issue herein subject to the qualifications that the subject Writ be stayed for a period of one hundred-twenty (120) days during which the Commonwealth of Kentucky is given the opportunity to reinstate the petitioner's direct appeal or initiate proceedings to retry the petitioner."

Although petitioners furnished an abundance of this Court's authority to the District Court, see their response to motion, Appendix at 15a-22a, the District Court relied entirely upon authority of the Sixth Circuit, without any mention of this Court's authority.

The Sixth Circuit, on second appeal, held that Mr. Lucey "was denied the effective assistance of counsel"

when his state appeal was dismissed by failure of retained appellate counsel to comply with appellate rules. The Sixth Circuit was of the opinion that § 115, Constitution of Kentucky, allows for at least one appeal as a matter of right.

The Sixth Circuit held:

> At appellate hearing before this court, counsel for the State of Kentucky argued with great vehemence that the District Judge's judgment was clearly erroneous and should be reversed since there is 'no constitutional due process entitlement to state-court appeal, and assistance of counsel being a due process right which does not exist at appeal (it exists only at trial) . . . it is clear that petitioner suffered no constitutional deprivation when his state appeal was lawfully dismissed.'
>
> We believe, however, that the contentions of Kentucky's legal representative in this case are mistaken.

While it is perfectly true that under the Federal Constitution no state is required to create an appellate system for persons convicted in lower courts of crime, *McKane* v. *Durston*, 153 U. S. 684 (1894), this holding does not extend to exclude federal habeas corpus review of violations of the Fourteenth Amendment occurring in the course of appellate proceedings created by state law. The cases which may be cited on this score are numerous. *Griffin* v. *Illinois*, 351 U. S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956); *Smith* v. *Bennett*, 365 U. S. 708, 81 S. Ct. 895, 6 L. Ed. 2d 39 (1961); *Draper* v. *Washington*, 372 U. S. 487, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963), and *Ross* v. *Moffit*, 417 U. S. 600 (1974).

In this instance there is no doubt but that appellant lost his right to appeal when as found by the District Court, 'his retained attorney failed to file a statement of Appeal.'

In this case it should be noted that Kentucky's Constitution was amended to provide for at least one appeal as a matter of right as of January 1, 1976 before defendant's conviction. See Section 115, Constitution of Kentucky. *See also Blankenship* v. *Commonwealth of Kentucky*, App. 554 S. W. 2d 898 (Ky. App. 1977).

We recognize that counsel did file an appellate brief which he contends contained the 'essentials' of Kentucky's Rule of Appellate Procedure 1.095 (a)(1). He also concedes that he did not file the Statement of Appeal provided for by R.A.P. 1.095 (a)(1). See Appendix A attached.

The District Judge's findings of fact are not clearly erroneous. We agree with his conclusion that petitioner 'was denied the effective assistance of counsel.'

The judgment of the District Court is affirmed.

ARGUMENT AND REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. Dismissal by the Court of Appeals of Kentucky of Respondent's State Appeal, Pursuant to Neutral Rule Which Operated Neutrally Upon Appellate Counsel's Default, Did Not Violate Any Part of the Constitution. Specifically, There Is No Constitutional Right of Effective Assistance of Appellate Counsel as There Is to Trial Counsel. Dismissal of a State Appeal Does Not Implicate Effective Assistance of Appellate Counsel Any More Than Does Dismissal of a United States Appeal.

The court below concluded that there is a 14th Amendment due process right to effective assistance of appellate counsel, and that respondent lost his "right" to state appeal because the default of his appellate counsel caused dismissal of the appeal. The effect of such conclusion, of course, is to say that neither Kentucky nor any other state may dismiss an appeal for failure to follow their rules of appellate procedure.

The Constitutional question which this Court should accept for decision is in two parts — (1) whether state courts may dismiss appeals from criminal convictions based upon appellate counsel's failure to follow procedural rules and (2) whether there is any due process Constitutional entitlement to effective assistance of appellate counsel, as there is to effective assistance of trial counsel.

It is undisputed that the parties hereto stipulated that there is no equal protection issue involved here!

Moreover, it is undisputed — and unremarked upon by either United States Court below — that this Court

and the courts of appeals of the United States can dismiss appeals based upon failure of appellate counsel to follow appellate rules. See, for example, Rules 16.1 and 33.7 of this Court and 31(c) of the Federal Rules of Appellate Procedure.[9] These rules of dismissal, presumably, do not offend the Constitution. That being so, why should state rules of dismissal offend the Constitution? (This point was early asserted in the District Court — see response to motion at Appendix 15a-22a.

Therefore, an egregious contradiction exists upon the face of state and federal rules, should the opinion of the court below go unreviewed and uncorrected.

That is, United States Courts may Constitutionally dismiss appeals, but if state courts dismiss appeals in the same way that action is unconstitutional.

In reaching its conclusion, the court below misconstrued and misapplied all five opinions of this Court which it identified. The court below also chose to overlook a number of other pertinent opinions of this Court which were cited by petitioners.

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[9]Rule 16.1 allows appeals to be dismissed, among other reasons, for failure to take them in conformity with statute or Rules of Court. Rule 33.7 also allows dismissal for non-compliance with the Rule, and dismissal *even may occur as a sanction*. F.R.A.P. 31(c) allows dismissal of an appeal for failure under the Rules to timely file a brief. Respondent's appeal was dismissed for failure to follow state rules.

This inconsistency in Constitutionally allowing dismissal of federal appeals and Constitutionally condemning dismissal of state appeals also is a clear violation by the court below of the principles of comity and federalism required by such opinions as *Francis* v. *Henderson*, 425 U. S. 536 (1976).

The opinions which were misconstrued and misapplied are *Griffin* v. *Illinois*, 351 U. S. 12 (1956); *Smith* v. *Bennett*, 365 U. S. 708 (1961); *Draper* v. *Washington*, 372 U. S. 487 (1963); *Ross* v. *Moffitt*, 417 U. S. 600 (1974); and *McKane* v. *Durston*, 153 U. S. 684 (1894).[9]

The court below correctly stated that *McKane* v. *Durston* establishes that no state is required to *create* an appellate system for persons convicted in lower courts of crime. The court below then erred in concluding that *McKane* v. *Durston's* holding "does not extend to exclude federal habeas corpus review of violations of the Fourteenth Amendment occurring in the course of appellate proceedings created by state law." This overlooks the explicitly stated reality of *McKane* v. *Durston* which states that appeals may be allowed under any terms or circumstances or conditions the state — and only the state — deems appropriate. This includes provision for dismissing appeals for failure to follow rules. And such conclusion of the

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[9]The court below even contradicted its own recent opinion in *Hollin* v. *Bowders*, 719 F. 2d 264 (10th Cir. 1983), another opinion not mentioned by the court below. Hollin acknowledges at p. 267 that "Such rights as the Supreme Court has conferred to date with respect to appellate counsel have rested on the *equal protection* basis that where state law permits a defendant of means to be represented by retained counsel on appeal, *equal protection* concepts of the Fourteenth Amendment require a similar right be accorded the indigent defendant. • • • Clearly different considerations affect the right to effective assistance of counsel at the *trial* and *appellate stages*." (emphasis added).

There is no doubt, then, that the court below even contradicted its own recent holding in finding 14th Amendment *due process* on appeal!

court below overlooks another reality, which is that *McKane* v. *Durston* explicitly states that appeal was not and is not a necessary element of due process of law.[5]

[5]As to appellate counsel, a reading of the Sixth Amendment, even without reference to the 14th Amendment, clearly shows that while the Sixth Amendment does guarantee an accused the assistance of counsel for his defense in all criminal prosecutions at trial, the amendment does not guarantee a right to counsel on appeal.

The Sixth Amendment provides:

> In all *criminal* prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. (Emphasis added).

Therefore, in order for there to be a Sixth Amendment right to counsel on appeal, appeal would have to be part of the criminal prosecution of trial. Appeal, however, is not part of the trial's criminal prosecution for Sixth Amendment purposes, *McKane* v. *Durston* and *Ross* v. *Moffitt*, which affirm there is no due process necessity of non-fundamental appeal. The right to counsel provisions of the Sixth Amendment therefore are not applicable to the appeals process. The right to trial counsel is due process, *Powell* v. *Alabama*, 287 U. S. 45 (1932), and due process does not exist on state appeal.

Of course, when the Sixth Amendment was ratified, there was no appeal right, either Constitutional or otherwise. The statutory right to appeal *federal* trial convictions did not come into being until 1889, *Abney* v. *United States*, 431 U. S. 651 (1977). See, as well, *Carroll* v. *United States*, 354 U. S. 394, n. 9 (1957).

If appeal were part of trial, the Constitution would require appeal. Appeal, therefore, is no part of trial. The appeal dis-

(Footnote continued on following page)

To quote directly from *McKane* v. *Durston*, at 153 U. S. pp. 687-688:

> An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, *was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion* of the State to allow or not to allow such a review. A citation of authorities upon the point is unnecessary.
>
> *It is, therefore, clear that the right of appeal may be accorded by the State to the accused upon such terms* as in its wisdom may be deemed proper. • • • *[W]hether an appeal should be allowed, and if so, under what circumstances or on what conditions, are matters for each State to determine for itself.* (emphasis added).

As will be seen, Kentucky by Constitutional mandate has created a strictly conditional system of appeal, based upon following certain rules.

This is the discretionary terms, conditions and circumstances which states may apply, under *McKane* v. *Durston*.

(Footnote continued from preceding page)

missal about which respondent Lucey complained occurred in state appellate court, long after jurisdiction had left the state trial court and attached under non-fundamental circumstances in the appellate court. See *Hoy* v. *Newburg Homes, Inc.*, Ky., 325 S. W. 2d 301, 302 (1959).

The court below also misconstrued and misapplied the opinions of *Griffin* v. *Illinois*, *Smith* v. *Bennett* and *Draper* v. *Washington*. These decisions, of course, are reached upon grounds of equal protection rather than due process, and involve disparity of treatment of rich and poor defendants and appellants, the non-indigent and the indigent.

As is acknowledged, no equal protection implication exists here, and these cases stand only for the equal protection reaches of the 14th Amendment. They do not stand for 14th Amendment due process.

Finally, the court below misconstrued and misapplied *Ross* v. *Moffitt*. *Ross* v. *Moffitt* seeks to clarify a generation of improper blurring of 14th Amendment equal protection and due process analysis, as embodied in the line of cases of *Griffin* v. *Illinois* and *Douglas* v. *California*, 372 U. S. 353 (1963). Those are equal protection cases.

Ross v. *Moffitt* supports completely the no-due-process-on-appeal doctrine of *McKane* v. *Durston*, which it cites, and reaffirms that while trial is fundamental to Liberty under the 14th Amendment, appeal is not fundamental to Liberty. *Ross* v. *Moffitt* goes on to detail the significant differences between trial and appeal. All this is to say, whatever a state does or does not do on appeal—whether or not to have an appeal and if so, how to operate it—is of no due process concern to the Constitution or to United States habeas corpus courts. Thus, the *Griffin-Douglas* line of cases applies only to controversies in which equal protection ques-

tions exist. Equal protection does not exist under the facts of this action. And as has been demonstrated, 14th Amendment due process does not exist on appeal.

In support of the *McKane* v. *Durston* holding that a state defendant who is convicted of a serious criminal offense has no due process right whatsoever under the Constitution to state appellate review, except to whatever conditional review the states may allow, petitioners also cite *Andrews* v. *Swartz*, 156 U. S. 272, at 275 (1895); *Kohl* v. *Lehlback*, 160 U. S. 293, at 297, 299 (1895); *Murphy* v. *Massachusetts*, 177 U. S. 155, at 158 (1900); *Ortwein* v. *Schwab*, 410 U. S. 656, at 660 (1973); and *Estelle* v. *Dorrough*, 420 U. S. 534, at 536 (1975).

Furthermore, the 14th Amendment does not draw to itself the provisions of state Constitutions or state law, even at criminal trials. State law is not reviewable by federal courts, *Buchalter* v. *New York*, 319 U. S. 427, at 429, 431 (1943). The law of state appeal, not being a Constitutional due process requirement, is unreviewable state law.

This is why, even at the fundamental *trial* level, the *procedures* of a state do not violate the 14th Amendment simply because another method may *seem* to federal courts to be fairer or wiser or to give a surer promise of protection to a defendant. *Snyder* v. *Massachusetts*, 291 U. S. 97, at 105 (1934) and *Spencer* v. *Texas*, 385 U. S. 554, at 564 (1967).

Moreover, neither is there a right of the Constitution for appeal from a conviction of a serious offense

prosecuted in the courts of the United States. Such federal appeal is not Constitutional but statutory. See, for example, *Heike* v. *United States*, 217 U. S. 423, at 428 (1910); *Bradford* v. *Southern R. Co.*, 195 U. S. 243, at 250 (1904); *United States* v. *Perrin*, 131 U. S. 55, at 57 (1889); *Forsyth* v. *United States*, 9 How 571, at 572 (1850); *Cotton* v. *United States*, 9 How 579, at 580 (1850); and *Abney* v. *United States*, 431 U. S. 651, at 656 (1977).

Abney states the federal jurisdiction reality just as explicitly as *McKane* sets forth the state jurisdiction reality:

> We approach the threshold appealability question with two principles in mind. First, it is well settled that there is no constitutional right to an appeal. *McKane* v. *Durston*, 153 U. S. 684 (1894). Indeed, for a century after this Court was established, no appeal as of right existed in criminal cases, and, as a result, appellate review of criminal convictions was rarely allowed.[9] As the Court described this period in *Reetz* v. *Michigan*, 188 U. S. 505 (1903):
>
> "[T]rials under the Federal practice for even the gravest offenses ended in the trial court, except in cases where two judges were present and certified a question of law to this court." Id., at 508.
>
> The right of appeal, as we presently know it in criminal cases, is purely a creature of statute; in order to exercise that statutory right of appeal one must come within the terms of the applicable statute—in this case, 28 U.S.C. § 1291.

• • •

[9] Appeals as of right in criminal cases were first permitted in 1889 when Congress enacted a statute allowing such appeals "in all cases of conviction of crime the punishment of which provided by law is death." Act of Feb. 6, 1889, 25 Stat. 656. A general right of appeal in criminal cases was not created until 1911. Act of March 3, 1911, 36 Stat. 1133.

Finally, the court below misconstrued and misapplied the Constitutional law of Kentucky as regards appeals. The court below found that respondent Lucey had a right—an absolute right—to state appeal.

In fact, the *very most* which any person in Kentucky has after conviction is a conditional opportunity or conditional right to pursue an appeal strictly according to the Kentucky rules of appellate proceedings. See Constitution of Kentucky, §§ 115-116, and *Foremost Ins. Co.* v. *Shepard*, Ky., 588 S. W. 2d 468 (1979), and *Stahl* v. *Commonwealth*, Ky., 613 S. W. 2d 617 (1981).

Section 115 provides for appellate rights generally, while § 116 gives appellate rule-making power to the Supreme Court of Kentucky. In *Foremost* (which also embraces a criminal as well as civil appeal), the Supreme Court of Kentucky stated in regard thereto:

> It is our opinion, however, that the right of appeal guaranteed by Section 115 may be conditioned upon strict adherence to orderly rules of procedure. "Substantive rights, even of constitutional magnitude, do not transcend procedural rules, because without such rules those rights would smother in chaos and could not survive." *Brown*

v. *Commonwealth*, Ky., 551 S. W. 2d 557, 559 (1971).

Stahl states that "Section 115 of the Constitution provides a right of appeal within the rules of court promulgated for that purpose. It does not guarantee a right of appeal in disregard of the rules."[9]

Thus, Kentucky has chosen to place terms, conditions and circumstances upon its appellate system as approved and guaranteed by *McKane* v. *Durston*. Kentucky law is non-reviewable by United States Courts, *Buchalter, Snyder, Spencer, supra*. The court below misconstrued and misapplied the law of the Constitution of Kentucky in finding that appeal in Kentucky is absolute, without terms or conditions. This is another important reason for this Court to grant the writ of certiorari. Kentucky Constitutional law has not been followed by the court below any more than has United States Constitutional law.

Thus, whatever state courts do about dismissing state appeals does not offend the Constitution on due process grounds. The Constitution does not embrace

[9]Instead of citing authority of the Supreme Court, which is Kentucky's highest court, the court below elected to cite instead an opinion of the intermediate Court of Appeals of Kentucky, *Blankenship* v. *Commonwealth*, Ky. App., 554 S. W. 2d 898 (1977). The Supreme Court authority presented by petitioners is more recent. But more importantly, *Blankenship* was decided without reference to § 116, Constitution of Kentucky, and therefore did not reach the holdings of *Foremost* and *Stahl* that § 115 is conditioned upon strict adherence to the rules mandated by § 116.

In addition to its system of limited and conditional appeal, Kentucky provides other vehicles for post-conviction relief. See (Ky.) RCr 11.42 and KRS 419.020, for example.

such appeal in any due process fashion, and equal protection, by stipulation of the parties, does not exist here. Thus, no relief, Constitutionally, can be granted in a United States habeas corpus court for the dismissal of a state appeal. In saying otherwise, the court below has contradicted the United States Constitution, various opinions of this Court, its own opinion in *Hollis, supra*, the Kentucky Constitution and opinions of the Supreme Court of Kentucky. Moreover, petitioners have shown the glaring unfairness of saying it is Constitutionally good for United States Courts to dismiss appeals for not following rules but that it is Constitutionally bad for state courts to dismiss appeals for not following rules.

CONCLUSION

Petitioners submit that questions of national importance to the courts of the states and of the United States have been raised, that these questions point to egregious unfairness in approach by the court below as respects state and United States rules and their application, and that these questions should be accepted for resolution under authority of Rules 17.1(a) and 17.1(e) of this Court.

Respectfully submitted,

DAVID L. ARMSTRONG
Attorney General

J. GERALD HENRY
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Capitol Building
Frankfort, Kentucky 40601-3494
Telephone: (502) 564-4044
Counsel for Petitioners

PROOF OF SERVICE

I, J. Gerald Henry, counsel of record for petitioners, hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari were mailed by United States mail, with first class postage prepaid, to Mr. Paul Isaacs, Public Advocate, State Office Building Annex, Frankfort, Kentucky 40601, and Mr. William M. Nixon, Route #7, Richmond, Kentucky 40475, counsel for respondent, and that all parties required to be served have been served, all on this February 17, 1984.

J. GERALD HENRY
Assistant Attorney General
Counsel of Record for Petitioners

APPENDIX

No. 82-5596

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

KEITH E. LUCEY, - - - - *Petitioner-Appellee,*

v.

PAUL KAVANAUGH, Supt., et al., - *Respondents-Appellants.*

APPEAL from the United States District Court
for the Eastern District of Kentucky.

OPINION—Decided and Filed January 12, 1984

Before: EDWARDS and CONTIE, Circuit Judges; SPIEGEL, District Judge.*

EDWARDS, Circuit Judge. In this appeal the State of Kentucky appeals an order entered by Chief Justice Bernard Moynahan of the Eastern District of Kentucky granting a petition for writ of habeas corpus to appellee Keith E. Lucey. The essential facts and issue at law are set forth effectively in the opinion entered after a remand to Judge Moynahan, which opinion reads, in part, as follows:

> Petitioner, following his conviction in the Circuit Court of Madison County, Kentucky of the offenses of trafficking in a Schedule I Controlled Substance (LSD) and trafficking in a Schedule II Controlled Substance

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*Honorable S. Arthur Spiegel, U. S. District Judge for the Southern District of Ohio, sitting by designation.

(cocaine), was sentenced to periods of confinement of five years and ten years, to be served concurrently. He sought to collaterally attack the legality of his confinement by the filing of a Petition for Writ of Habeas Corpus, claiming denial of his Constitutional right to the effective assistance of counsel on appeal. In a Judgment entered on November 6, 1979, this Court adopted the Magistrate's Report and Recommendation which stated that "the petitioner was denied the effective assistance of counsel on appeal when his retained attorney failed to file a Statement of Appeal, thereby resulting in the dismissal of the petitioner's appeal." The petitioner was granted a conditional Writ of Habeas Corpus.

Upon appeal, the United States Court of Appeals for the Sixth Circuit rendered a decision on April 2, 1981 in which the Petitioner's cause was remanded to this Court for the purpose of determining whether the dismissal of the petitioner's state appeal constituted a denial of equal protection of law.

In a subsequent hearing before this Court, counsel for both parties agreed an evidentiary hearing was unnecessary. A stipulation was filed wherein the parties stated that no equal protection issue exists in this action.

On March 19, 1982, the petitioner filed a motion requesting the reissuance of the conditional Writ of Habeas Corpus heretofore granted. The sole issue upon consideration of said motion is whether the petitioner was denied his due process right to the effective assistance of counsel on appeal when his state appeal was dismissed because of a procedural error of his attorney.

The Sixth Circuit Court of Appeals has recognized a due process right to the effective assistance of appel-

late counsel. *Gilbert* v. *Sowders*, 646 F. 2d 1146 (6th Cir. 1981); *Cleaver* v. *Bordenkercher*, 634 F. 2d 1010 (6th Cir. 1980).

• • •

In the instant case, the failure of petitioner's attorney to file a Statement of Appeals resulting in the foreclosure of state appellate review denied him the effective assistance of counsel. *Beasley* v. *United States*, 491 F. 2d 687 (6th Cir. 1974). Accordingly, the petitioner's motion for reissuance of a conditional Writ of Habeas Corpus must be, and the same is, hereby sustained. A Judgment will this day be entered directing that a Writ of Habeas Corpus issue herein subject to the qualifications that the subject Writ be stayed for a period of one-hundred-twenty (120) days during which the Commonwealth of Kentucky is given the opportunity to reinstate the petitioner's direct appeal or initiate proceedings to retry the petitioner.

At appellate hearing before this court, counsel for the State of Kentucky argued with great vehemence that the District Judge's judgment was clearly erroneous and should be reversed since there is "no constitutional due process entitlement to state-court appeal, and assistance of counsel being a due process right which does not exist at appeal (it exists only at trial) . . . it is clear that petitioner suffered no constitutional deprivation when his state appeal was lawfully dismissed."

We believe, however, that the contentions of Kentucky's legal representative in this case are mistaken.

While it is perfectly true that under the Federal Constitution no state is required to create an appellate system for persons convicted in lower courts of crime, *McKane* v. *Durston*, 153 U. S. 684 (1894), this holding does not extend to exclude federal habeas corpus view of violations of the

Fourteenth Amendment occurring in the course of appellate proceedings created by state law. The cases which may be cited on this score are numerous. *Griffin* v. *Illinois*, 351 U. S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956); *Smith* v. *Bennett*, 365 U. S. 708, 81 S. Ct. 895, 6 L. Ed. 2d 39 (1961); *Draper* v. *Washington*, 372 U. S. 487, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963), and *Ross* v. *Moffit*, 417 U. S. 600 (1974).

In this instance there is no doubt but that appellant lost his right to appeal when as found by the District Court, "his retained attorney failed to file a statement of Appeal."

In this case it should be noted that Kentucky's Constitution was amended to provide for at least one appeal as a matter of right as of January 1, 1976 before defendant's conviction. See Section 115, Constitution of Kentucky. *See also Blankenship* v. *Commonwealth of Kentucky*, App. 554 S. W. 2d 898 (Ky. App. 1977).

We recognize that counsel did file an appellate brief which he contends contained the "essentials" of Kentucky's Rule of Appellate Procedure 1.095(a)(1). He also concedes that he did not file the Statement of Appeal provided for by R.A.P. 1.095(a)(1). See Appendix A attached.

The District Judge's findings of fact are not clearly erroneous. We agree with his conclusion that petitioner "was denied the effective assistance of counsel."

The judgment of the District Court is affirmed.

APPENDIX A

KENTUCKY RULE OF APPELLATE PROCEDURE (RAP) 1.095(a)(1)

RAP 1.095(a)(1) states that the pleadings in the Court of Appeals of Kentucky must contain, *inter alia*, "[t]he same information as required in a statement of appeal in the Supreme Court pursuant to RAP 1.090."

RAP 1.090 states:

> In all cases the appellant shall file with the record on appeal a statement setting forth:
>
> (a) The name of each appellant and each appellee (only parties named are before the court—"et al." and "etc." are not proper designations of parties).
>
> (b) The name and address of counsel for each appellant and each appellee.
>
> (c) The name and address of the trial judge.
>
> (d) The date the judgment appealed from was entered, and the page of the record on appeal on which it may be found. In civil cases the date of judgment shall be the date the clerk made the notation required by CR 77.04(2). In criminal cases the date of judgment shall be the date the clerk served the notice required by RCr 12.55 as shown by his endorsement on the retained copy of the notice.
>
> (e) The date the notice of appeal was filed and the page of the record on appeal on which it may be found.
>
> (f) Such of the following facts, if any, as are true:
>
> (1) a notice of cross-appeal has been filed;
>
> (2) a supersedeas bond has been executed;
>
> (3) Any reason the appeal should be advanced;

(4) this is a suit involving multiple claims and judgment has been made final under CR 54.02;

(5) there is another appeal pending in a case which involves the same transaction or occurrence, or a common question of law or fact with which this appeal should be consolidated, giving the style of the other case;

(6) the appellant is free on bond.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Civil No. 78-134

KEITH E. LUCY . . . . . *Petitioner*

v.

WILLIAM SEABOLD, ET AL. . . . . *Respondents*

JUDGMENT—Filed September 10, 1982

The Petitioner having filed a Motion to Reissue the Conditional Writ of Habeas Corpus heretofore granted on November 6, 1979 and the Respondents having filed a response thereto, and the Court being sufficiently advised IT IS THEREFORE ORDERED AND ADJUDGED HEREIN as follows:

(1) That the Petitioner's Motion to Reissue a Conditional Writ of Habeas Corpus be, and the same is hereby, sustained, and it is directed that the Writ issue herein subject to the qualifications set out in numerical paragraph (2) hereof. *Beasley* v. *United States*, 491 F. 2d 687 (6th Cir. 1974); *Gilbert* v. *Sowders*, 646 F. 2d. 1146 (6th Cir. 1981).

(2) That execution of the subject Writ of Habeas Corpus is stayed for a period of one hundred-twenty (120) days during which the Commonwealth of Kentucky is given the opportunity to reinstate the Petitioner's direct appeal or initiate proceedings to retry the Petitioner.

This the 10th day of September, 1982.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Civil No. 78-134

KEITH E. LUCY . . . . . *Petitioner*

v.

WILLIAM SHADOLD, ET AL. . . . . *Respondents*

MEMORANDUM OPINION—Filed September 10, 1982

Petitioner, following his conviction in the Circuit Court of Madison County, Kentucky of the offenses of trafficking in a Schedule I Controlled Substance (LSD) and trafficking in a Schedule II Controlled Substance (cocaine), was sentenced to periods of confinement of five years and ten years, to be served concurrently. He sought to collaterally attack the legality of his confinement by the filing of a Petition for Writ of Habeas Corpus, claiming denial of his Constitutional right to the effective assistance of counsel on appeal. In a Judgment entered on November 6, 1979, this Court adopted the Magistrate's Report and Recommendation which stated that "the petitioner was denied the effective assistance of counsel on appeal when his retained attorney failed to file a Statement of Appeal, thereby resulting in the dismissal of the petitioner's appeal." The petitioner was granted a conditional Writ of Habeas Corpus.

Upon appeal, the United States Court of Appeals for the Sixth Circuit rendered a decision on April 2, 1981 in which the petitioner's cause was remanded to the Court for the purpose of determining whether the dismissal of

the petitioner's state appeal constituted a denial of equal protection of law.

In a subsequent hearing before this Court, counsel for both parties agreed an evidentiary hearing was unnecessary. A stipulation was filed wherein the parties stated that no equal protection issue exists in this action.

On March 19, 1982, the petitioner filed a motion requesting the reissuance of the conditional Writ of Habeas Corpus heretofore granted. The sole issue upon consideration of said motion is whether the petitioner was denied his due process right to the effective assistance of counsel on appeal when his state appeal was dismissed because of a procedural error of his attorney.

The Sixth Circuit Court of Appeals has recognized a due process right to the effective assistance of appellate counsel. *Gilbert v. Sowders*, 646 F. 2d 1146 (6th Cir. 1981); *Cleaver v. Bordenkercher*, 634 F. 2d 1010 (6th Cir. 1980). In *Gilbert v. Sowders, supra*, the petitioner's retained counsel violated a technical procedural rule which resulted in the dismissal of his state appeal. The federal district court granted a Petition for Writ of Habeas Corpus after determining that the petitioner had been denied effective assistance of appellate counsel. The Sixth Circuit Court of Appeals, affirming the issuance of the Writ, concluded that the failure of the Kentucky Supreme Court to reconsider the dismissal of the petitioner's appeal was "arbitrary, capricious, and an abuse of due process of law, as protected by the United States Constitution." 646 F. 2d at 1147. It is clear from the foregoing opinion that an "appellate counsel's failure to perform procedural duties necessary to prosecute an appeal is a denial of due process" in this Circuit. 646 F. 2d at 1150 (Jones, J., concurring).

In the instant case, the failure of petitioner's attorney to file a Statement of Appeal resulting in the foreclosure of state appellate review denied him the effective assistance

of counsel. *Beasley* v. *United States*, 491 F. 2d 687 (6th Cir. 1974). Accordingly, the petitioner's motion for re-issuance of a conditional Writ of Habeas Corpus must be, and the same is, hereby sustained. A Judgment will this day be entered directing that a Writ of Habeas Corpus issue herein subject to the qualifications that the subject Writ be stayed for a period of one-hundred-twenty (120) days during which the Commonwealth of Kentucky is given the opportunity to reinstate the petitioner's direct appeal or initiate proceedings to retry the petitioner.

This the 10th day of September, 1982.

/s/ Bernard T. Moynahan, Jr.
Bernard T. Moynahan, Jr., Judge

No. 79-3752

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

KAREN E. LUCEY, - - - - *Petitioner-Appellee,*

v.

WILLIAM SHADDEN, Superintendent, Blackburn Correctional Complex, - - *Respondent-Appellant.*

Appeal from the United States District Court for the Eastern District of Kentucky.

OPINION—Decided and Filed April 2, 1981

Before: EDWARDS, Chief Judge, ENGEL and JONES, Circuit Judges.

The Court delivered a PER CURIAM opinion. JONES, Circuit Judge (p. 3), delivered a separate dissenting opinion.

PER CURIAM. This is an appeal from the United States District Court for the Eastern District of Kentucky which entered a writ of habeas corpus on petition of appellee Lucey who claimed deprivation of his right to effective assistance of appellate counsel.

The facts in this case show that Lucey's retained counsel had perfected his appeal and had filed the necessary record and briefs by the Court of Appeals of Kentucky had dismissed his appeal because he had failed to follow the requirement of Kentucky Rule of Appellate Procedure 1.095 (a)(1) which includes the requirement that the pleadings in the Court of Appeals must contain "[t]he same information as required in a statement of appeal in the Supreme Court pursuant to RAP 1.030."

There is no question, of course, but that the Court of Appeals has a perfect right to demand that such a document be prepared and filed. Two questions, however, might be considered as arising: 1) whether Lucey's lawyer had been guilty of ineffective assistance of counsel within our *Beasley* v. *United States*, 491 F. 2d 687 (6th Cir. 1974), rule and 2) whether the case should be remanded to the District Court to take testimony on the question of whether, as claimed by appellee Lucey, the dismissal of his appeal violated equal protection since no such action had been taken on any other case under similar facts.

Study of this record convinces this court that this case should be remanded to determine the equal protection issue set forth immediately above.

This case is ordered remanded for such purpose with power to take any needed testimony.

Jones, Circuit Judge, dissenting. It is an important duty of counsel to ensure that his client has an opportunity to present his claims at an appeal of right. Appellate counsel's failure to comply with Kentucky's Rule of Appellate Procedure 1.095(a)(1), causing the dismissal of the appeal without a consideration of the merits, is ineffective assistance of counsel violative of due process. *Gilbert* v. *Saunders*, No. 79-3597 (6th Cir. April 2, 1981) (per curiam) (Jones, concurring. *See also Anders* v. *California*, 386 U. S. 745 (1967); *Benoit* v. *Wingo*, 423 F. 2d 880, 883 (6th Cir. 1970). Consequently, I would affirm the judgment of the district court granting Seabold's petition for writ of habeas corpus.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LEXINGTON

C. No. 78-134

KEITH E. LUCEY - - - - - - - *Petitioner*

v.

WILLIAM SEABOLD, Supt. - - - - - *Respondent*

JUDGMENT—Filed November 6, 1979

The Court having considered the Magistrate's Report and Recommendation herein, together with the exceptions filed thereto by the Respondent, and having heard the parties orally in regard to the issues presented herein and being sufficiently advised;

IT IS NOW THEREFORE ORDERED AND ADJUDGED HEREIN AS FOLLOWS:

(1) That the Magistrate's Report and Recommendation heretofore filed herein be and the same is hereby adopted, ratified and confirmed by the Court herein.

(2) The subject Petition for a Writ of Habeas Corpus is sustained, and it is directed that the Writ issue herein subject to the qualifications set out in numerical paragraph (3) hereof. *Beasley* v. *United States*, 491 F. 2d 687 (6th Cir. 1974), *Benoit* v. *Wingo*, 423 F. 2d 880 (6th Cir. 1970), cert. denied 400 U. S. 852, *Goodwin* v. *Cardwell*, 432 F. 2d 521 (6th Cir. 1970); *Boyd* v. *Cowan*, 519 F. 2d 182 (6th Cir. 1975).

(3) That execution of the subject Writ of Habeas Corpus is stayed for a period of one-hundred-twenty (120)

days during which the Commonwealth of Kentucky is given the opportunity to reinstate the petitioner's direct appeal or initiate proceedings to retry the petitioner.

(4) That the conduct of the petitioner's counsel, William M. Nixon, P. O. 698, Richmond, Kentucky 40475, herein in attacking his own work product by the prosecution of the instant Habeas Corpus proceeding based upon said petitioner's allegation of his own ineffectiveness as counsel for the petitioner in the state proceedings is hereby referred to the Board of Governors of the Kentucky State Bar Association for whatever action, if any, that body may deem appropriate.

(5) The Clerk of this Court shall forthwith forward to the Board of Governors of the Kentucky State Bar Association a duly authenticated copy of the Magistrate's Report and Recommendation herein and the Court's Judgment this date entered herein for such action, if any, as that body may deem appropriate.

This the 6th day of November, 1979.

/s/ Bernard T. Moynahan, *Jr.*
Bernard T. Moynahan, *Jr.*, Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Civil Action No. 78-134

Keith E. Lucas - - - - - - - *Petitioner*

v.

William Seamon, Et Al. - - - - - *Respondent*

RESPONSE TO MOTION—*Filed March 20, 1980*

As directed by this court, respondent by counsel presents this response to motion, and states of case.

1. Respondent agrees with petitioner that petitioner has never raised an equal protection claim either in this court or in the United States Court of Appeals for the Sixth Circuit. Had petitioner done so, however, respondent respectfully submits that petitioner would have found it impossible to show facts supporting such a claim. Perhaps that is why the equal protection claim was never raised. Accordingly, respondent further agrees with petitioner that there is no need for this court to conduct an evidentiary hearing on a non-existent equal protection matter.

2. Respondent submits that, upon reflection, this court should reconsider its prior decision herein, and issue an order dismissing the petition for writ of habeas corpus. This is because petitioner suffered no Constitutionally protected due process deprivation when his state-court appeal was lawfully dismissed. When given the opportunity, the Sixth Circuit found no Constitutional deprivation, either. Dismissing the petition would in no way conflict with the

Sixth Circuit, and opposition by this court could assist that court, should petitioner appeal.

State appellate review is not required by Constitutional *due process*. Such appeal is wholly within the *discretion* of the state to allow or not to allow, upon such *terms* as the *state alone deems* proper. *McKane* v. *Durston*, 153 U. S. 684, at 687-688 (1894). Assistance of counsel is a *due process* right, *Powell* v. *Alabama*, 287 U. S. 45 (1932).

There being no Constitutional due process entitlement to state-court appeal, and assistance of counsel being a due process right which does not Constitutionally exist at appeal (it exists only at trial), and the parties being in agreement that there is no equal protection question herein, it is clear that petitioner suffered no Constitutional deprivation when his state appeal was lawfully dismissed.

The vitality of *McKane*, explicitly showing the non-existence of Constitutional due process on state appeal, has often been confirmed. See *Andrews* v. *Swartz*, 156 U. S. 272, at 275 (1895); *Kohl* v. *Lehlbach*, 160 U. S. 293, at 297, 299 (1895); *Murphy* v. *Massachusetts*, 177 U. S. 155, at 156 (1900); *Ortwein* v. *Schwab*, 410 U. S. 656, at 660 (1973); *Ross* v. *Moffitt*, 417 U. S. 600, at 606 (1974); and *Estelle* v. *Dorrough*, 420 U. S. 534, at 536 (1975).

Furthermore, the 14th Amendment does not draw to itself the provisions of state Constitutions or state law, even at criminal trials. State law is not reviewable by federal courts, *Bachellier* v. *New York*, 319 U. S. 417, at 429, 431 (1943). The law of state appeal, not being a Constitutional due process requirement, is unreviewable state law.

This is why, even at the fundamental *trial* level, the *procedures* of a state do not violate the 14th Amendment simply because another method may seem to federal courts to be fairer or wiser or to give a surer promise of protection to a defendant. *Snyder* v. *Massachusetts*, 291 U. S. 97, at

105 (1934), and *Spencer* v. *Texas*, 385 U. S. 554, at 564 (1967).

What all this Constitutional exposition by the Supreme Court of the United States means, is that trial is fundamental to liberty under the 14th Amendment but appeal is not fundamental, *Ross* v. *Moffitt*, *supra*, at 610-611. That is to say, whatever a state does or does not do on appeal, as opposed to trial, is of no due process concern to the Constitution or to federal habeas corpus courts.

Appeal is not even Constitutionally fundamental in strictly federal jurisdiction from strictly federal prosecutions. *Heike* v. *United States*, 217 U. S. 423, at 428 (1910); *Bradford* v. *Southern R. Co.*, 195 U. S. 243, at 250 (1904); *United States* v. *Perris*, 131 U. S. 5, at 57 (1889); *Forsyth* v. *United States*, 9 How 571, at 572 (1850); *Cotton* v. *United States*, 9 How 579, at 580 (1850); and *Abney* v. *United States*, 431 U. S. 651, at 656 (1977).

Thus, whatever state courts do about dismissing appeals does not offend the Constitution. The Constitution does not embrace such appeal in *any* due process fashion. Thus, no relief, Constitutionally, can be granted to petitioner in a federal habeas corpus court.

3. In its own way, the Sixth Circuit's opinion herein agrees with this analysis while nevertheless trying to avoid it, when it says, "There is no question, of course, but that the Court of Appeals has a *perfect right* to demand that such a document be prepared and filed." (emphasis added). Left unsaid is the necessarily correlative right to enforce that right by dismissing appeals for failure to comply with state rules.

The Sixth Circuit attempts to avoid the obvious by raising "two questions":

> 1) Whether Lucey's lawyer had been guilty of ineffective assistance of counsel within our *Beasley* v. *United States*, 491 F. 2d 687 (6th Cir. 1974), rule and

2) Whether the case should be remanded to the District Court to take testimony on the question of whether, *as claimed by appellee Lucey*, the dismissal of his appeal violated equal protection since no such action had been taken on any other case under similar facts. (emphasis added).

As we have seen, petitioner himself has dashed the Sixth Circuit's scholarship on point 2. Petitioner, contrary to the Sixth Circuit's assertion, correctly represents to this court that he has never presented an equal protection clause issue to the Sixth Circuit, either by written pleadings or at oral argument, and that because of that and the essential agreement of the parties hereto about the facts, there is no need for this court to conduct an evidentiary hearing.

The Sixth Circuit's scholarly question (but no decision) about *Beasley*, supra, is equally suspect. *Beasley* involved a federal prosecution where due process ineffective assistance of counsel at fundamenital *trial*, and on non-fundamental appeal, was alleged. The court did find due process ineffective assistance of counsel at trial but *did not* find ineffective assistance of counsel on appeal. Therefore, *Beasley* does not and Constitutionally cannot apply to dismissal of state appeal. As has been shown, there is no Constitutional entitlement to due process on appeal, *McKane* and *Ross*, supra. Just wishing it did exist, or thinking it better or wiser if it did, will not make it so. *Snyder* and *Buchalter*, supra. In fact, as this court knows, counsel is not Constitutionally required even in federal habeas corpus actions which directly assert Constitutional deprivation.

The Sixth Circuit, of course, has had great difficulty with this type issue, as is evident from its opinion in this case, in *Gilbert* v. *Sowders*, 646 F. 2d 1146 (6th Cir. 1981), and in *Cleaver* v. *Bordenkircher*, 634 F. 2d 1010 (6th Cir.

1980). Its opinions, obviously, are not at all harmonious, taken together or singly.

For example, reference to the last paragraph of *Cleaver* shows that the Sixth Circuit was most uncertain as to whether its decision would ultimately rest upon equal protection or due process. This is all the more interesting when read in conjunction with the district court's unpublished memorandum opinion in that case, Cleaver v. Bordenkircher (No. 78-204 E.D. Ky., Pikeville, May 30, 1979), cited by petitioner in his motion. A copy of that district court opinion previously was placed before this court.

There, Judge Hermansdorfer pointedly noted that in finding a *due process right* to effective assistance of *appellate* counsel he relied upon pre-*Ross* opinions of the Sixth Circuit, which of course had direct review power over his court. In so doing, he specifically recognized the lack of clarity as to the basis and thus the extent of any Constitutional due process right to assistance of counse on state-court appeal, discussing *Ross*, supra. But for the pre-*Ross* Sixth Circuit cases, Judge Hermansdorfer appeared inclined in just the opposite direction, based upon *Ross*.

Ross, of course, explicitly reaffirms the no-due-process doctrine on appeal of *McKane*, reaffirms that it is trial, not appeal, which is fundamental under the 14th Amendment, and appears to be a modern attempt by the Supreme Court to clarify some murky if not aberrant statements which recently had crept into that Court's pronouncements on this matter.

The Sixth Circuit, of course, relegated Judge Hermansdorfer's due process analysis to an alternative basis behind its own equal protection analysis. In this regard, it is well worth noting a parallel in *Cleaver* and in this case.

Judge Hermansdorfer explicitly noted that Mr. Cleaver did not raise an equal protection claim. Yet in its opinion, the Sixth Circuit made an equal protection decision, and

went out of its way to buttress that decision by announcing that respondent never denied an equal protection factual claim!

4. One final practical point will be made. Federal courts Constitutionally approve the dismissal of appeals in their own jurisdiction, based upon default or omission or act of appellate counsel. See Rules 14, 16.1 and 33.7 of the Supreme Court and F.R.A.P. 31(c). What act of appellate counsel is worse than a default which causes the entire appeal to be dismissed? The obvious answer, of course, is that there is no worse act for appellate counsel. Since federal courts approve identical appeals dismissal rules for themselves, how can they Constitutionally disapprove such rules of state courts?

Respondent submits that if it is Constitutionally proper for federal courts to dismiss appeals, it is Constitutionally proper for state courts to dismiss appeals. These federal rules are but the practical manifestation of the Constitutional argument herein submitted by respondent.

As petitioner has noted, this issue is not new. Yet so far as respondent knows, no federal court has explained why it is Constitutionally wrong for state courts to dismiss appeals when it is Constitutionally right for federal courts to dismiss appeals under identical circumstances. Respondent earnestly and respectfully submits that until such Constitutional explanation is made, federal-state friction will increase, contrary to the command of *Sumner* v. *Mata*, ____ U. S. ____, 101 S. Ct. 764, at 770-771 (1980). In the event respondent's primary Constitutional argument is rejected by this court, respondent earnestly requests this court to explain the above double standard regarding state and federal rules of dismissal.

WHEREFORE, for the reasons and authority presented, respondent prays that this court reconsider its prior order herein and enter a new order and judgment dismissing the

petition for writ of habeas corpus, upon a determination that no Constitutional deprivation befell the petitioner on state appeal.

Respectfully submitted,

Steven L. Beshear
Attorney General

(s) Gerald Henry
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601-3494
Telephone: (502) 564-4044
Counsel for Respondent

NOTICE

Please take notice that the foregoing Response to Motion will be mailed, first class postage prepaid, this 26th day of March, 1982, to the Clerk, United States District Court, Eastern District of Kentucky, Federal Building, Lexington, Kentucky 40507, to be considered at the convenience of the court.

(s) Gerald Henry
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been delivered to Mr. William M. Radigan, Assistant Public Advocate, State Office Building Annex, Frankfort, Kentucky 40601, under terms of the service agreement between the Public Advocate and the Attorney General; and mailed, first class postage prepaid, to Mr. William M. Nixon, Route #7, Richmond, Kentucky 40475, co-counsel for petitioner, this 20th day of March, 1992.

(s) Gerald Henry
Assistant Attorney General

UNITED STATES CONSTITUTION

AMENDMENT 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT 14

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the

Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each house, remove such disability.

Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Section 5

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

RESPONDENT'S

BRIEF

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-1379

PAUL HARGRAVES, SUPERINTENDENT,
BLACKBURN CORRECTIONAL COMPLEX, and
DAVID L. ARMSTRONG, ATTORNEY GENERAL, PETITIONERS

v.

KEITH F. LACEY, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

[illegible] GIVEN THE FACTS AND CIRCUMSTANCES
OF HIS CASE, THE RESPONDENT WAS DENIED HIS
DUE PROCESS RIGHT TO EFFECTIVE ASSISTANCE OF
APPELLATE COUNSEL WHEN HIS APPELLATE COUNSEL
FAILED TO FILE A STATEMENT OF APPEAL AT THE
SAME TIME THAT HE FILED RESPONDENT'S BRIEF FOR
APPELLANT BEFORE THE COURT OF APPEALS OF KENTUCKY
WITH THE RESULT THAT THE RESPONDENT'S DIRECT
APPEAL FROM HIS CRIMINAL CONVICTION [illegible]

COUNTERSTATEMENT OF THE CASE

The respondent basically concurs with the "Statement of the Case" presented by the petitioners in their Petition for a Writ of Certiorari insofar as it reflects the proceedings before the United States District Court for the Eastern District of Kentucky and the United States Court of Appeals for the Sixth Circuit. (Petition, pp. 4-6). However, in order to completely understand the circumstances of his case, the respondent feels that it is necessary to review the factual events which occurred within the Kentucky trial and appellate systems:

Contrary to his plea, the respondent was found guilty by the jury in the Madison Circuit Court (Richmond, Kentucky) on one count of trafficking in a Schedule I controlled substance (LSD) and one count of trafficking in a Schedule II controlled substance (cocaine), both in violations of KRS 218.990. The respondent was sentenced to a total of fifteen (15) years of imprisonment, and, additionally, was fined a total of fifteen thousand dollars ($15,000.00). Final judgment was entered on March 29, 1977, and a timely Notice of Appeal was filed by respondent's counsel.

Following the preparation of the record on appeal, the respondent on September 12, 1977, filed a Brief for Appellant with the Court of Appeals of Kentucky. The issues presented in this timely pleading were the following:

I.

WAS IT ERROR TO ADMIT PHOTOGRAPHS OF THE APPELLANT SOME PHOTOGRAPHS OF WHICH LACKED ANY PROBATIVE VALUE AND SERVED ONLY TO INFLAME AND TO AROUSE THE PASSION AND PREJUDICE OF THE JURY?

II.

WAS THE CHARGE TO THE JURY JUST BUT ARGUMENTATIVE OF THE DUE PROCESS OF LAW?

III.

WAS THE APPELLANT DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY DURESS CONFLICT DURING THE TRIAL AND BY PREJUDICIAL COMMENTS MADE BY THE PROSECUTOR DURING HIS SUMMATION?

Incidentally enough, the attorney for the Commonwealth requested and was granted an extension of time to file the Brief for Appellee. On December 13, 1977, the Commonwealth filed their appellate brief. Additionally, the Commonwealth filed a motion to dismiss the respondent's direct appeal on the ground that the respondent had failed to comply with the requirements of Kentucky Rule of Appellate Procedure (RAP) 1.095(a)(1).[1]

In an Order entered on January 11, 1978, the Court of Appeals of Kentucky dismissed the respondent's direct appeal because "the appellant has failed to supply the information required by RAP 1.095 (a)(1)".

On January 17, 1978, the respondent's filed a Motion for Reconsideration with the Court of Appeals of Kentucky. In essence, the respondent argued that all of the information required by RAP 1.095 and RAP 1.095 were contained in the Brief for Appellant filed on September 12, 1977. Consequently, respondent argued that he had substantially complied with the requirements of the rules of appellate procedure.

However, the Court of Appeals of Kentucky in an Order entered on February 7, 1978, summarily overruled respondent's motion.

On February 27, 1978, the respondent filed a Motion for Discretionary review with the Supreme Court of Kentucky requesting that the actions taken by the Court of Appeals of Kentucky be reviewed. In his pleadings, the respondent raised the following specific issues:

I.

WAS THE KENTUCKY COURT OF APPEALS DENIED THE RESULT WAS CONSTITUTIONAL RIGHT TO AN APPEAL AND THE DUE PROCESS OF LAW AS GUARANTEED BY THE KENTUCKY CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA BY DISMISSING HIS APPEAL ON PROCEDURAL GROUNDS WHERE THERE WAS OTHER FACTUAL SUBSTANTIAL COMPLIANCE AND NO PREJUDICE TO THE COMMONWEALTH OR TO THE COURT?

II.

IS RAP 1.095(a)(1) UNCONSTITUTIONALLY VAGUE, AMBIGUOUS, AND IRRATIONAL IN THE EXTENT THAT A LITERAL AND REASONABLE INTERPRETATION OF THE RULE UNDER THE VARIANT THE DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

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[1] The text of RAP 1.095(a)(1) is reproduced in Appendix A to the Sixth Circuit's opinion in the respondent's case. Harris v. Rivera, ___ F.2d ___ (6th Cir. 1984).

III.

[illegible]

IV.

[illegible]

On June 4, 1979, the Supreme Court of Kentucky denied the respondent's motion and specifically affirmed the dismissal of the appeal by the Court of Appeals of Kentucky.

Subsequently, respondent filed an action in the Madison Circuit Court pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42 requesting the trial court to either vacate the judgment or to grant a belated appeal. This motion was denied on August 2, 1979. In view of the decision of the Supreme Court of Kentucky in Chaney v. Commonwealth, Ky., 561 S.W.2d 344 (1978), no appeal from this ruling was taken.

As reflected in the petitioners' "Statement of the Case", the respondent subsequently filed a Petition for Writ of Habeas Corpus in the federal district court. Following the issuance of a conditional writ of habeas corpus for the respondent by the federal district court, and the affirmance of that writ by the Sixth Circuit, the respondent's case is now before this Court.

REASONS FOR DENYING THE WRIT

I.

[illegible]

Throughout his pleadings before this Court, the petitioners have consistently taken the position that there is no due process right to the effective assistance of appellate counsel. The respondent submits that a review of the decisions of this Court, the lower federal courts, and the various state courts reveal that due process of law and fundamental fairness mandate the effective assistance of appellate counsel.

A. The Supreme Court

Within the past twenty (20) years, this Court has given extensive consideration to the rights of indigents on appeal. In Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956), the Court examined an Illinois rule which allowed appellate review of a criminal conviction only if the defendant paid for the trial transcript. As a result, an indigent who could not afford the cost of obtaining the transcript was precluded from obtaining appellate review of his conviction. Four justices concluded that this procedure violated both the due process clause and the equal protection clause of the Fourteenth Amendment. Mr. Justice Frankfurter, who cast the deciding vote, concluded that the Illinois procedure violated the equal protection clause. Id., 76 S.Ct. at 592.

In Smith v. Bennett, 365 U.S. 708, 81 S.Ct. 895, 6 L.Ed.2d 39 (1961), Iowa required a filing fee in order to file a state habeas petition, and in Burns v. Ohio, 360 U.S. 252, 79 S.Ct. 1164, 3 L.Ed.2d 1209 (1959), the Supreme Court of Ohio required a $20.00 filing fee for leave to appeal a judgment to the Ohio Court of Appeals. Each of these state-imposed financial barriers to an appeal was held to violate the Fourteenth Amendment.

Similarly, the Court invalidated a number of barriers to access to a transcript for appellate purposes. For example, Lane v. Brown, 372 U.S. 477, 83 S.Ct. 768, 9 L.Ed.2d 892 (1963), involved an Indiana statute providing that only the public defender could obtain a free transcript. In Draper v. Washington, 372 U.S. 487, 83 S.Ct. 774, 9 L.Ed.2d 899 (1963), and indigent could obtain a free transcript only if he convinced the trial judge that the appeal was not frivolous. Both screening devices were likewise held violative of the Fourteenth Amendment.

In Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963), the Court expanded its review of appellate process to examine whether an indigent's access to an appellate system was adequate. In concluding that a state must provide counsel for the indigent on his first appeal as of right, the Court relied upon both the due process clause and the equal protection clause of the Fourteenth Amendment.

> But it is appropriate to observe that a State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an "invidious discrimination."
>
> When an indigent is forced to run this gantlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure. Id., 83 S.Ct. at 816, (emphasis added).

Contrary to the extensive argument presented by the petitioner to this Court, both clauses of the Fourteenth Amendment apply to an examination of an indigent's access to an appellate system. If there was any question on this matter, it was resolved by the decision in Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974). Mr. Justice Rehnquist explained:

> The precise rationale for the Griffin and Douglas lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that amendment. Neither Clause by itself provides an entirely satisfactory basis for the result reached, each depending on a different inquiry which emphasizes different factors. "Due process" emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. "Equal protection," on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable. Id., 94 S.Ct. at 2443; (emphasis added).

It is precisely because of the due process clause that this Court has made it clear that an indigent's appellate counsel cannot abandon his appeal in midstream. Entsminger v. Iowa, 386 U.S. 748, 87 S.Ct. 1402, 1404, 18 L.Ed.2d 501 (1967), ("here there is no question but that petitioner was precluded from obtaining a complete and effective appellate review of his conviction. . .").

In Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), the Court made it unmistakably clear that an indigent's appellate counsel must provide a minimum level of competent representation. The Court required, as a matter of federal constitutional law, that the indigent receive "that advocacy which a nonindigent defendant is able to obtain." Id., 87 S.Ct. at 1400. The reasoning for this Court's requirement of an "active advocate" on appeal is conclusive as to the issue as to whether an indigent is entitled to effective assistance of appointed counsel:

> Moreover, such handling would intend to protect counsel from the constantly increasing charge that he was ineffective and had not handled the case with that diligence to which an indigent defendant is entitled. Id., 87 S.Ct. at 1400; (emphasis added).

As the Seventh Circuit stated in Nichols v. Gagnon, 434 F.2d 467, 471 (7th Cir. 1971):

> The Anders opinion requires appointed counsel to represent his client effectively. . . and to demonstrate in writing that he has discharged his professional responsibilities. (emphasis added).

b - The Lower Federal Courts

The lower federal courts are unanimous in holding that the critical error of court-appointed counsel cannot serve to deny his client's right to appeal. In Bacon v. Lash, 458 F.2d 962 (7th Cir. 1972), in an opinion by Mr. Justice Stevens (then Circuit Judge), the petitioner claimed that the incompetence of court-appointed counsel denied his right to appeal. In Bacon, counsel filed a futile motion for extension of time instead of a timely motion for a new trial. As a result, Mr. Bacon lost his right to appeal his conviction for murder. Speaking in words remarkably appropriate to the case at bar, Mr. Justice Stevens stated:

> With due respect for the views of the Indiana Supreme Court, we are persuaded that petitioner's federal claim has merit. The Federal Constitution contains no requirement that a defendant be given appellate review of his conviction, but if such review is provided, appellate procedures and their availability to the indigent must satisfy the Fourteenth Amendment's basic standards of fairness. Since the Supreme Court has held that those standards require the states to waive even nominal filing fees, to provide free transcripts, to appoint counsel, and to refuse to dismiss meritless appeals that have not been adequately evaluated by appellate counsel, we believe it is equally clear that petitioner's right to appeal could not be forfeited by the critical error of the state-level court-appointed counsel disclosed by this record. Id., at 969-970, (emphasis added, footnotes omitted).

In Benoit v. Wilson, 423 F.2d 980 (6th Cir. 1970), the Sixth Circuit examined a factual circumstance remarkably similar to the case at bar. In the cited case, the appellant's court-appointed attorney filed a timely notice of appeal and obtained an extension of time for perfecting the appeal. Id., at 981. The attorney then wrote the appellant a letter informing him that the appeal "would be wasting our time" and refusing to continue with the appeal. Id., at 981-982. The Court, in analyzing the appellant's situation, stated:

> Counsel in his letter to the appellant, abandoning the appeal, wrote with such finality that it gave the appellant no opportunity to request him to continue with the appeal. Further, counsel did not leave the appeal in such status that the appellant being confined in prison and being unlearned in law could be expected to pick it up pro se and prosecute it to the conclusion. Neither did he have an opportunity to have the trial judge appoint new counsel to assist him in the prosecution of his appeal. The appellant was entitled not only to an appeal as a matter of right but he was entitled to have the assistance of counsel in proceeding that appeal. Id., at 991; (emphasis added).

In directing the issuance of a conditional writ of habeas corpus, the Court concluded "that the appellant did not have adequate and effective assistance of counsel in prosecuting his appeal." Id., at 991.

In Gilbert v. Sanders, 446 F. 2d 1144 (6th Cir. 1971), the Court recognized that "Kentucky has, of course, a right to enforce its own rules of procedure," but concluded that "the failure of the Kentucky Supreme Court to grant appellant's counsel's motions for reconsideration of the dismissal of the appeal was arbitrary and capricious, and an abuse of due process of law, as protected by the United States Constitution." Id., at 1147. The Court noted that "(b)y these motions the (Kentucky) Supreme Court had been fully advised as to the obviously sincere attempt to perfect an appeal. . . . ." Id.

Indeed, in his concurring opinion Judge Jones adds that "appellate counsel's failure to perform duties necessary to prosecute an appeal is a denial of due process" and "(t)hus appellate counsel's failure to obtain an extension of time. . . on appeal denied (the appellant) due process of law." Id., at 1150; (emphasis in original). Judge Jones emphasizes that " (s)uch a ruling will not have a unduly burdensome effect on the administration of state appellate courts." Id., See Cleaver v. Wainwright, 434 F.2d 1010 (6th Cir. 1970), cert. denied & rem. Sanders v. Cleaver, 101 S.Ct. 2345 (1981), where federal habeas corpus relief was granted because the petitioner "ha(d) been deprived of his right to appeal his conviction solely because his indigency status rule the overburdened public defender his only source of legal representation" in violation of both the equal protection clause and the due process clause of the federal constitution.[2]

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[2] In their Petition, the petitioners have alleged that the decision of the Sixth Circuit in respondent's case is in direct conflict with its opinion in Hollin v. Sanders, 710 F.2d 264 (6th Cir. 1983), which, according to the petitioners, (footnote continued on following page).

In an effort to avoid extensive repetitive argument, respondent lists below other federal decisions which concluded that the error of appellate counsel (whether court-appointed or retained) cannot serve to deny a defendant access to the appellate process:

D.C. CIRCUIT

Hines v. United States, 237 A.2d 827 (D.C. Cir. 1968) (counsel files late notice of appeal).

FIRST CIRCUIT

Leventhal v. Cavin, 396 F.2d 441 (1st Cir. 1968) (counsel fails to preserve appeal).

SECOND CIRCUIT

United States ex rel Vasilli v. Reincke, 393 F.2d 129 (2nd Cir. 1967) (counsel fails to appeal); United States ex rel Smith v. McMann, 417 F.2d 668 (2nd Cir. 1969) (attorney fails to inform indigent of appellate rights).

FOURTH CIRCUIT

Williams v. Coiner, 392 F.2d 210 (4th Cir. 1968)(counsel fails to file Notice of Appeal); Nelson v. Peyton, 415 F.2d 1154 (4th Cir. 1969) (attorney fails to advise client of right to appeal); Turner v. North Carolina, 412 F.2d 496 (4th Cir. 1969) (attorney fails to preserve appeal).

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[2] (continued)
hold that the right to appellate counsel rests solely on equal protection grounds. (Petition, p. 11 at fn 4) The respondent submits that the petitioners have misrepresented the decision in Hollin.

In the cited case, the defendant's direct appeal from his 1971 conviction had been dismissed by the Supreme Court of Kentucky due to his counsel's failure to timely file the record on appeal. Id., at 265. With new counsel, the defendant filed a postconviction action in the trial court raising the issues of the right to a belated appeal and a trial error which was the same issue which the defendant had desired to raise on his dismissed appeal. Id., at 265-266. The Supreme Court of Kentucky, upon review of the case, "declined to vacate Hollin's conviction both on the merits and because his argument was 'not properly preserved.' " Id., at 266. The Sixth Circuit denied Hollin any relief because the Supreme Court of Kentucky's "invocation of the state's contemporaneous objection rule provided an adequate and independent state ground on which to dispose of this case." Id., at 267.

The portion of the Hollin opinion quoted by the petitioners was purely dicta, with no precedential value. In Hollin, the Sixth Circuit specifically stated:

> Whether, as the District Court suggests, Cuyler v. Sullivan is to be extended to require the effective assistance of retained counsel on appeal, we need not decide now. . . Id., at 267.

Additionally, the petitioners conveniently ignore the concurring opinion of Judge Merritt where he reviewed various Sixth Circuit opinions since 1975 which have provided a due process right to effective assistance of counsel. Id., at 268-269. Judge Merritt also quoted, with approval, the Fifth Circuit's observation in Fergus v. Wainwright, 640 F.2d 596 (5th Cir. 1981), that:

> Each federal circuit court . . . has under varying circumstances, recognized a denial of due process to defendants whose right to appeal was lost through wrongdoing or neglect of counsel. Id., at 598, fn 3.

FIFTH CIRCUIT

Hawley v. Stynchcombe, 400 F. 2d 708 (5th Cir. 1968) (attorney fails to file Notice of Appeal); Arline v. United States, 404 F.2d 496 (5th Cir. 1968) (counsel fails to file Notice of Appeal); Scott v. Henderson, 445 F.2d 622 (5th Cir. 1971) (attorney fails to preserve appeal); Larrabee v. Smith, 439 F.2d 1036 (5th Cir. 1971) (counsel fails to advise client as to right of appeal); Hall v. Wainwright, 441 F.2d 198 (5th Cir. 1971); (notice of appeal filed late); Wesley v. Smith, 470 F.2d 1320 (5th Cir. 1973) (attorney fails to file Notice of Appeal, withdraws as counsel of record); Flanagan v. Henderson, 496 F.2d 1274 (5th Cir. 1974) (counsel fails to obtain entire record on appeal); Pressley v. Wainwright, 540 F.2d 818 (5th Cir. 1976) (counsel withdraws after appeal began public defender doesn't substitute in time); Carroll v. Alabama, 546 F.2d 652 (5th Cir. 1977) attorney fails to file proper record on appeal); Passmore v. Estelle, 594 F.2d 115 (5th Cir. 1979) (one sentence brief).

SIXTH CIRCUIT

Goodloe v. Cardwell, 432 F.2d 521 (6th Cir. 1970) (failure to advise client of right to appeal); Henderson v. Cardwell, 426 F.2d 150 (6th Cir. 1970) (counsel fails to advise client of appellate rights); Yates v. Hoppe, 425 F.2d 1167 (6th Cir. 1970) (attorney fails to file Notice of Appeal); Udzinski v. Neil, 444 F.2d 92 (6th Cir. 1971) (attorney abandons appeal); Kostinski v. United States, 459 F.2d 59 (6th Cir. 1972) (attorney fails to perfect appeal); Davis v. United States, 464 F.2d 1097 (6th Cir. 1972) (attorney withdrew after sentencing); Ford v. Cowan, 494 F.2d 338 (6th Cir. 1974) and Ford v. Cowan, 519 F.2d 352 (6th Cir. 1975) (failure to preserve appeal).

EIGHT CIRCUIT

Williams v. United States, 402 F.2d 548 (8th Cir. 1968) (attorney fails to file Notice of Appeal); Blackhurst v. Nyman, 429 F.2d 59 (8th Cir. 1970) (counsel fails to serve Notice of Appeal).

NINTH CIRCUIT

Gutman v. Cupp, 415 F.2d 352 (9th Cir. 1969) (failure to file Notice of Appeal); Riser v. Craven 501 F.2d 381 (9th Cir. 1974) (counsel fails to file Notice of Appeal); Fitch v. Rhay, 519 F.2d 109 (9th Cir. 1975), (four page brief).

TENTH CIRCUIT

Vann v. Page, 349 F.2d 930 (10th Cir. 1966) (client not informed of appellate rights).

c - state courts

In addition to the federal courts, state courts apparently without exception, support respondent's position. In Shipman v. Gladden, Ore., 493 P.2d 921 (1969), the appellant's counsel failed to file a timely notice of appeal. As a result, Mr. Shipman lost his right to appeal to the Oregon Supreme Court. However, the Court, in turn, affirmed the rejection of his motion for a belated appeal, stating:

> 'We hold that because of the culpable negligence of his counsel petitioner was deprived of his Fourteenth Amendment right to due process. Since the state's criminal process would be rendi tachie or inadequate [sic] unless it permitted the invocation of appellate review by the culpable neglect of counsel, the state must provide a remedy adequate to restore the lost[sic] right. Id., at 927, (emphasis added).

In Metcalfe v. Rutledge, 231 Ga. 745, 204 S.E.2d 141 (1974), the Supreme Court of Georgia examined a situation where an appeal was dismissed due to the failure of counsel to obtain a timely extension of time for filing the transcript on appeal. In holding that this inaction constituted ineffective assistance of counsel, the court stated:

> An attorney who through negligence, ignorance, or misinterpretation of the law as contended here, fails to perform routine duties resulting in a dismissal of his client's appeal, thereby denying such client's a right of review after conviction cannot be said to be rendering effective assistance. The result is the same as no assistance at all. Whether counsel was retained, as here, or appointed by the court, is immaterial. Id., 204 S.E.2d at 142.

The Court of Appeals of Maryland in Wilson v. State, Md., 399 A.2d 254 (1979), reached a similar result when analyzing the exact issue presented in the case at bar:

> Entitlement to assistance of counsel would be hollow indeed unless the assistance were required to be effective. It follows that a criminal defendant has the right to the effective assistance of counsel on the first appeal of his conviction and that the conviction of counsel upon his compliance of a serious error. Id., at 260, (emphasis added).

Interestingly enough, the Kentucky Court of Appeals has seemingly recognized that a defendant has the right to effective assistance of counsel on appeal. See Blankenship v. Commonwealth, supra, at 901; Lewis v. Commonwealth, Ky. App., 561 S.W.2d 27 (1978). Similarly, the Supreme Court of Kentucky has recently acknowledged that factors "such as overwork" could "result in ineffective assistance of counsel

at the appellate level." Stahl v. Commonwealth, Ky., 613 S.W.2d 617, 619 (1981), emphasis added).[3]

Other jurisdictions which have recognized that a defendant cannot be denied his right to appeal due to error by his appellate counsel include:

CALIFORNIA

In Re Smith, 97 Cal. Rptr. 697, 671 P.2d 9 (1971)(brief consisting of one page of legal argument).

DELAWARE

Erb v. State, Dela., 332 A.2d 137 (1974) (counsel fails to prepare transcript and record).

ILLINOIS

State v. Irvin, Ill., 334 N.E.2d 236 (1974) (counsel files a late Notice of Appeal).

ILLINOIS

People v. Brown 59 Ill.2d 307, 275 N.E. 2d 362 (1968) (attorney fails to file brief); People v. Jacobs, 61 Ill.2d 540, 338 N.E. 2d 161 (1975) (attorney obtains two extensions of time to file record on appeal, but never files either record or brief); People v. Aldrich, 60 Ill.2d 574, 329 N.E.2d 205 (1975) (counsel obtains three extensions of time to file brief on appeal, but never files brief).

KENTUCKY

State v. Scott, Ky., 492 S.W.2d 429 (1973) (counsel failed to file Notice of Appeal); Carr v. State, Ky., 523 S.W.2d 478 (1975) (attorney gives client incorrect information about implications of successful appeal).

TENNESSEE

Taylorie v. State, Tenn., 542 S.W.2d 815 (1976) (counsel fails to file petition for certiorari to Tennessee Supreme Court).

TEXAS

Steel v. State, Tex., 433 S.W.2d 696 (1970) (attorney fails to file brief); Garza v. State, Tex., 433 S.W. 2d 428 (1968) (failure to file brief); Jackson v. State, Tex., 447 S.W. 2d 922 (1969) (no appellate briefs filed); Ex Parte Hill, Tex., 528 S.W.2d 259 (1975) (failure to file brief); Ex Parte Baker,

---

[3] Counsel for the petitioners referred this Court to the Stahl case for proposition that the right to appeal in Kentucky is conditional to adherence the rules of appellate procedure. (Petition, pp.17-18). He neglected to mention t Stahl also recognized a due process right to effective assistance of appellate nsel.

Tex., 528 S.W.2d 257 (1975) (retained counsel failed to file appellate brief); Guillory v. State, Tex., 557 S.W.2d 118 (1977) (no transcript nor brief filed in appellate court); Hogan v. State, Tex., 572 S.W.2d 526 (1978) (no transcript of evidence nor brief filed with appellate court).

WEST VIRGINIA

State ex rel Bratcher v. Cooke, W. Va., 188 S.E. 2d 769 (1972) (attorney fails to file timely written Notice of Appeal); Carter v. Bordenkircher, W.Va., 226 S.E.2d 711 (1976) (counsel fails to preserve appeal).

For the reasons stated, the respondent submits that the finding of the Sixth Circuit that he was denied his constitutional right to the effective assistance of appellate counsel was based upon substantial legal precedent. Since the petitioners have failed to demonstrate that the opinion in the case at bar is in conflict with decisions of either this Court or the other federal circuits, the respondent respectfully requests this Court to deny this petition for writ of certiorari.

II.

CONTRARY TO THE ARGUMENT OF THE PETITIONER, THE DECISION OF THE SIXTH CIRCUIT IN THE RESPONDENT'S CASE DOES NOT UNDERMINE THE RULES OF APPELLATE PROCEDURE ESTABLISHED BY THE SUPREME COURT OF KENTUCKY.

In his petition before this Court, the petitioners have contended that the Sixth Circuit's opinion in the case sub judice is of national importance inasmuch as it undermines the rules of appellate procedure of Kentucky and all other states:

> The United States Court of Appeals for the Sixth Circuit has decided a nationally important question which involves the power of state appellate courts over state appeals procedures in direct conflict with McKane v. Durston, 153 U.S. 684 (1894), Powell v. Alabama, 287 U.S. 45 (1932), Ross v. Moffitt, 417 U.S. 600 1974), Francis v. Henderson, 425 U.S. 536 (1976), Abney v. United States, 431 U.S. 651 (1977), and the principles embodied in Rules 16.1 and 33.7 of this Court and Rule 31(c) of the Federal Rules of Appellate Procedure.
>
> As a practical matter, we have been told that courts of the United States Constitutionally can, dismiss appeals but courts of the states Constitutionally cannot dismiss appeals. (Petition, at p.3).

However, the respondent submits that the decision in his case does not ...er the power of the Kentucky Appellate Courts to enforce its valid procedural les. In the present case, the Court of Appeal of Kentucky's sanction was

misplaced. The net effect of the actions of the Court of Appeal of Kentucky was to deny the respondent his right under the Kentucky Constitution to appeal his conviction as punishment for his counsel's actions. Certainly this constitutes a denial of fundamental fairness.

If the Court of Appeal of Kentucky was of the opinion that respondent's counsel engaged in unprofessional and dilatory tactics, sanctions against undersigned counsel would have been proper. United States v. Hayes, 378 F.2d 567, 568 (4th Cir. 1967); United States v. Smith, 426 F.2d 1130 (9th Cir. 1970). See Barry v. State, Fla. App., 324 So.2d 95 (1975). However, regardless of respondent's counsel's performance of his duties (or lack thereof), "(t)he consequences of his lawyer's failure should not be visited upon (the petitioner) in the form of his loss of his right to appeal. . ." United States v. Hayes, supra, at 568.

The Fifth Circuit in Flanagan v. Henderson, 496 F.2d 1274 (5th Cir. 1974), recognized that any sanction for failure to comply with procedural rules must be applied against the negligent attorney and not the criminal defendant:

> When a court discovers that an attorney has been derelict in the performance of a court duty which could forfeit a legal right accorded to a defendant in a criminal case is significant as the right to an appeal on the merits, disciplinary measures against the attorney-rather than deprivation of the defendant's rights-may be the only constitutional remedy. Id., at 1278.

The Court of Criminal Appeals of Texas in Guillory v. State, Tex., 557 S.W.2d 118 (1977), addressed this same issue and specified those measures which could be utilized to guarantee that the appellant's rights would be protected:

> As has been states above, the trial court also has the duty to provide an indigent defendant with the effective assistance of counsel on appeal. This assistance, however, cannot be afforded without requiring that counsel file a brief in an appellate's behalf. The trial judge has the authority to require appointed counsel to file a brief in appellant's behalf. Luna v. State, 527 S.W.2d 548 (Tex.Cr.App.1975). If a court-appointed attorney fails to file a brief within the time provided by Art. 40.09(9) and fails to request an extension of time from this Court under Art. 40.09(16), the trial court still has the authority to require appointed counsel to file a brief in an appellant's behalf. There are many ways for the trial court to exercise this authority. Upon learning that no brief has been filed in appellant's behalf under Art. 40.09(9), the trial court can issue an order commanding court-appointed counsel to file a brief within a specified period of time.

> If no brief is filed within that time, the trial court can issue another order requiring counsel to the appropriate grievance committee for disciplinary action. In the alternative, the trial judge can relieve an appointed attorney who will act as an advocate to represent the indigent on appeal. The trial judge can also see to it that recalcitrant attorneys receive no further appointments to represent indigents in his court. Id., at 121.

The petitioners have also argued before this Court that the decision in the respondent's case has imposed a limitation on the state courts which the federal courts do not impose on themselves. Petition, at pp. 9-10, 19. Nothing could be further from the truth.

In Carter v. City of Memphis, Tennessee, 636 F.2d 159 (6th Cir. 1980), the Sixth Circuit focused on the issue of whether the dismissal of a civil action at the trial level is appropriate where the neglect is solely the fault of the attorney for the plaintiff. The Carter court explained that "(t)he dismissal of an action for an attorney's failure to comply is a harsh sanction which the court should order only in extreme situations showing 'a clear record of delay or contumacious conduct by the (client).' " Carter v. City of Memphis, Tennessee, supra at 161. "Absent this showing an order of dismissal is an abuse of discretion; the court is limited to lesser sanctions to achieve compliance." Id.

Although cast in a slightly different factual context, the legal analysis of the Carter court is appropriate to the case at bar. "Dismissal is usually inappropriate where the neglect is solely the fault of the attorney." Id.

In the final analysis, the petitioners ask this Court to sanction a rule of law whereby a defendant can be denied his right to a direct appeal through no fault of his own and be left without any remedy or recourse. There is a reason why the petitioners are unable to cite to any case law in support of his position - there is none.

The opinion of the Sixth Circuit in the respondent's case reflects proper deference to the right of the Kentucky Appellate Courts to enforce its rules of appellate procedure. However, under the facts of the respondent's case, the sanction applied was inappropriate. For these reasons, the petition for a writ of certiorari should be denied.

CONCLUSION

For the reasons stated above, the respondent respectfully requests this Court to deny the Petition for a Writ of Certiorari filed in the above-captioned case.

Respectfully submitted,

WILLIAM H. RADIGAN
VALYER & RADIGAN
Suite 303, Legal Arts Building
200 South Seventh Street
Louisville, Kentucky 40202
(502) 583-7713

COUNSEL FOR RESPONDENT

MAILED 4/12/83

Form 1040 U.S. Individual Income Tax Return 1982

KEITH LUCEY
2741 FORFAR CT
CLEARWATER FLA 33519

405 64 6726

Filing Status: 1 X Single

Exemptions: 6a X Yourself; 65 or over; Blind

Income:
7 Wages, salaries, tips, etc. 6198
8 Interest income
9a Dividends
10 Refunds of State and local income taxes
11 Alimony received
12 Business income or (loss) (attach Schedule C)
13 Capital gain or (loss) (attach Schedule D)
14 40% capital gain distributions not reported on line 13
15 Supplemental gains or (losses) (attach Form 4797)
16 Fully taxable pensions, IRA distributions, and annuities not reported on line 17
17a Other pensions and annuities. Total received
18 Rents, royalties, partnerships, estates, trusts, etc. (attach Schedule E)
19 Farm income or (loss) (attach Schedule F)
20a Unemployment compensation (insurance). Total received
21 Other income (state nature and source—see page 10 of Instructions)
22 Total income. Add amounts in column for lines 7 through 21 6198

Adjustments to Income:
23 Moving expense (attach Form 3903 or 3903F) 460 00
24 Employee business expenses (attach Form 2106) 3350 00
25 Payments to an IRA. You must enter code from page 33 ( )
26 Payments to a Keogh (H.R. 10) retirement plan
27 Penalty on early withdrawal of savings
28 Alimony paid
29 Deduction for a married couple when both work (see back of Schedule W)
30 Disability income exclusion (attach Form 2440) 3810 00
31 Total adjustments. Add lines 23 through 30 3810 00

Adjusted Gross Income:
32 Subtract line 31 from line 22. If this line is less than $10,000, see "Earned Income Credit" (line 62) on page 15 of Instructions. If you want IRS to figure your tax, see page 3 of Instructions 2388 00

Because I have Received only PART of my 1983 TAX STATEMENTS, This information (PART) is based on my ENCLOSED 1982 Tax Returns, which takes INTO Consideration AN INCREASE IN ESTIMATED INCOME From my NOW, SINGULAR SOURCE OF INCOME, SALES.

Keith Lucey

NOTICE OF LIEN

IDENTIFICATION NUMBER	MAKE	YEAR	TYPE
[illegible]	REPAIR T	881	LE CAR
DATE OF LIEN	AMOUNT OF LIEN		DATE OF LOAN
9/8	1939.00		11/03/81

Keith Lucey

X

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

_____

Misc. No. ____

_____

PAUL HERRINGTON, Superintendent, Blackburn Correctional Complex, and DAVID L. ARMSTRONG, Attorney General — Petitioners,

v.

KEITH E. LUCEY — Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Keith E. Lucey, being first duly sworn, depose and say that I am the respondent in the above-captioned case; that in support of my motion to proceed in forma pauperis without being required to prepay fees, costs, or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? Yes ( ) No (✓)

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. (2-84) Florida Rock Tools — My hourly earnings at last Application to work — $ 4.00 per hour.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes (✓) No ( )

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months. Commissions from Sales of Telephone Systems & Tone —

3. Do you own any cash or checking or savings accounts? Yes (✓) No ( )

a. If the answer is yes, state the total value of the items owned.
$25.-

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes (✓) No ( )

a. If the answer is yes, describe the property and state its approximate value. 1981 LE CAR - LAST WEEK, while A CAR DEALER REPOSSESSED this CAR, AN OFFER OF $2000.- TRADE VALUE WAS OFFERED ON the TIED HERE p.s. OFF

5. List the persons who are dependent upon you for your support and state your relationship to those persons. Ms. DIANE SWIFT (live IN GIRLFRIEND). HOUSEHOLD RENT AND UTILITIES ARE $385.- PER MONTH.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Keith E. Lucey
KEITH E. LUCEY

Subscribed and sworn to before me by Keith E. Lucey on this 22nd day of March, 1984.

Loraine R. Stillwell
NOTARY PUBLIC, STATE-AT-LARGE

My Commission expires: [illegible]

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-1379

PAUL BRADSHAW, SUPERINTENDENT, KENTUCKY CORRECTIONAL CENTER, and DAVID L. ARMSTRONG, ATTORNEY GENERAL, PETITIONERS

v.

KEITH E. LUCEY, RESPONDENT

CERTIFICATE OF SERVICE

I, William M. Ratigan, counsel for respondent, hereby certify that the attached Brief for Respondent in Opposition, Motion for Leave to Proceed in Forma Pauperis, and Affidavit of Indigency were served on petitioners by mailing, U.S. postage prepaid, copies of the aforementioned documents, on March 19, 1984, to petitioners' counsel, J. Gerald Hoey, Assistant Attorney, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601. I further certify that all parties required to be served have been served.

WILLIAM M. RATIGAN
MEMBER, BAR OF THE SUPREME COURT OF THE UNITED STATES

7093 April 15 Cert

FEB 22 1994
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

NO. 93-1371

PAUL KAMINSKI, SUPERINTENDENT,
BLACKBURN CORRECTIONAL COMPLEX, and
DAVID L. ARMSTRONG, ATTORNEY GENERAL, PETITIONERS

v.

KEITH E. LUCEY, RESPONDENT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The respondent, Keith E. Lucey, who is now on parole, asks leave to file the attached Brief for Respondent in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46 in the above-captioned action. The respondent has been permitted to proceed in forma pauperis in all proceedings in the court below.

The respondent's affidavit in support of this motion is attached hereto.

Respectfully submitted,

[illegible]
[illegible] & RADIGAN
Suite 301, Legal Arts Building
241 South Seventh Street
Louisville, Kentucky 40202
([illegible]) 583-7711

COUNSEL FOR RESPONDENT

PETITIONER'S

BRIEF

Office - Supreme Court, U.S.
FILED
JUN 14 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1378

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

PAUL KAVANAUGH, Superintendent, Blackburn Correctional Complex and DAVID L. ARMSTRONG, Attorney General . . . . . Petitioners

vs.

KEITH E. LUCEY . . . . . Respondent

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONERS

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Counsel for Petitioners

Petition for Certiorari Docketed February 17, 1984.
Certiorari Granted April 23, 1984.

BEST AVAILABLE COPY

QUESTION PRESENTED

Did Dismissal by the Court of Appeals of Kentucky of Respondent's State Appeal, Pursuant to Neutral Procedural Rule Which Operated Neutrally Upon Appellate Counsel's Default, Violate Any Part of the Constitution of the United States?

Specifically, Is There a Constitutional Right to Appellate Counsel Or to Effective Assistance of Appellate Counsel As There Is for Trial Counsel? If So, Does Dismissal of a State Appeal Implicate Effective Assistance of Appellate Counsel Any More Than Does Dismissal of a United States Appeal?

PARTIES TO THE PROCEEDING

All the parties to this proceeding are set forth in the caption of this case.

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No. 83-1378

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

PAUL KAVANAUGH, Superintendent, Blackburn Correctional Complex and
DAVID L. ARMSTRONG, Attorney General - *Petitioners*

v.

KEITH E. LUCEY - - - - - *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONERS

CITATIONS TO THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The United States Court of Appeals for the Sixth Circuit has rendered two opinions in this matter. The most recent opinion was decided on January 12, 1984, and is styled Keith E. Lucey v. Paul Kavanaugh, Supt., et al., No. 82-5596. This opinion may be found at Joint Appendix 63a-68a, and such opinion is published at *Lucey* v. *Kavanaugh*, 724 F. 2d 560 (6th Cir. 1984). The judgment and memorandum opinion from which such appeal was taken are from the United States District Court for the Eastern District of Kentucky at Lexington, entered September 10, 1982. Such

unpublished judgment and memorandum opinion may be found at J.A. 59a-62a.

The first opinion of the United States Court of Appeals for the Sixth Circuit in this matter was rendered April 2, 1981, and was styled Keith E. Lucey v. William Seabold, Superintendent, Blackburn Correctional Complex, No. 79-3752, and may be found at J.A. 45a-46a. Such opinion is published at *Lucey v. Seabold*, 645 F. 2d 547 (6th Cir. 1981). First appeal was from an unpublished judgment of the United States District Court for the Eastern District of Kentucky at Lexington, dated November 6, 1979. Such judgment may be found at J.A. 43a-44a.

STATEMENT OF JURISDICTION

Jurisdiction is conferred upon this Court to review by writ of certiorari the appellate opinion in question by 28 U.S.C. §2101(e) and 28 U.S.C. §1254(1). As provided by 28 U.S.C. 2101(e), application to this Court to review by writ of certiorari must be made within 90 days after entry of opinion. The opinion of the United States Court of Appeals for the Sixth Circuit was decided on January 12, 1984, and the petition for writ of certiorari was timely docketed on February 17, 1984.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners submit that there is no Constitutional authority to justify the result of the United States Court of Appeals for the Sixth Circuit. Such absence of authority involves reference to:

The Sixth Amendment, Constitution of the United States.

The Fourteenth Amendment, Constitution of the United States.

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment provides:

> Section 1
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 2
>
> Representatives shall be apportioned among the several States according to their respective

numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each house, remove such disability.

Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services

in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Section 5

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF THE CASE

In the District Court, respondent Lucey invoked federal jurisdiction under 28 U.S.C. §2254.

Petitioners accept the facts as set forth by the District Court and quoted by the Sixth Circuit in its second opinion[1] (J.A. 60a-62a; 63a-65a):

"Petitioner (Lucey), following his conviction in the Circuit Court of Madison County, Kentucky of the offenses of trafficking in a Schedule I Controlled Substance (LSD) and trafficking in a Schedule II Controlled Substance (cocaine), was sentenced to periods of confinement of five years and ten years, to be served concurrently. He sought to collaterally attack the legality of his confinement by the filing of a Petition for Writ of Habeas Corpus, claiming denial of his

[1]Petitioners do not accept the conclusions of the courts below and do not accept the authority used to reach such conclusions. Petitioners accept only the historical facts which show how Mr. Lucey came to the District Court.

Constitutional right to the effective assistance of counsel on appeal. In a Judgment entered on November 6, 1979, this Court adopted the Magistrate's Report and Recommendation which stated that 'the petitioner was denied the effective assistance of counsel on appeal when his retained attorney failed to file a Statement of Appeal, thereby resulting in the dismissal of the petitioner's appeal.' The petitioner was granted a conditional Writ of Habeas Corpus.

"Upon appeal, the United States Court of Appeals for the Sixth Circuit rendered a decision on April 2, 1981 in which the petitioner's cause was remanded to this Court for the purpose of determining whether the dismissal of the petitioner's state appeal constituted a denial of equal protection of law.

"In a subsequent hearing before this Court, counsel for both parties agreed an evidentiary hearing was unnecessary. A stipulation was filed wherein the parties stated that no equal protection issue exists in this action.[2]

"On March 19, 1982, the petitioner filed a motion requesting the reissuance of the conditional Writ of Habeas Corpus heretofore granted. The sole issue

[2]Prior to its remand, the Sixth Circuit had been told explicitly by the parties that no equal protection issue existed. Accordingly, its first decision to remand appears to be inexplicable. See page 2 of Mr. Lucey's petition for rehearing in the Sixth Circuit, where he stated, "In actuality, neither . . . Lucey nor . . . Seabold have presented an equal protection issue to this Court, either by written pleadings or at oral argument." At page 3 thereof, Mr. Lucey added that he had made no equal protection claim in any court. See as well J.A. 48a.

upon consideration of said motion is whether the petitioner was denied his due process right to the effective assistance of counsel on appeal when his state appeal was dismissed because of a procedural error of his attorney.

"The Sixth Circuit Court of Appeals has recognized a due process right to the effective assistance of appellate counsel. *Gilbert* v. *Sowders*, 646 F. 2d 1146 (6th Cir. 1981); *Cleaver* v. *Bordenkircher*, 634 F. 2d 1010 (6th Cir. 1980).

• • •

"In the instant case, the failure of petitioner's attorney to file a Statement of Appeal resulting in the foreclosure of state appellate review denied him the effective assistance of counsel. *Beasley* v. *United States*, 491 F. 2d 687 (6th Cir. 1974). Accordingly, the petitioner's motion for reissuance of a conditional Writ of Habeas Corpus must be, and the same is, hereby sustained. A Judgment will this day be entered directing that a Writ of Habeas Corpus issue herein subject to the qualifications that the subject Writ be stayed for a period of one hundred-twenty (120) days during which the Commonwealth of Kentucky is given the opportunity to reinstate the petitioner's direct appeal or initiate proceedings to retry the petitioner."

Although petitioners furnished an abundance of this Court's authority to the District Court, their response to motion, J.A. 51a-57a, the District Court relied entirely upon authority of the Sixth Circuit, without any mention of this Court's authority.

The Sixth Circuit, on second appeal, held that Mr. Lacey "was denied the effective assistance of counsel" when his state appeal was dismissed by failure of retained appellate counsel to comply with state appellate rules. The Sixth Circuit was of the opinion that §115, Constitution of Kentucky, allows for at least one appeal as a matter of right.

The Sixth Circuit stated:

"At appellate hearing before this court, counsel for the State of Kentucky argued with great vehemence that the District Judge's judgment was clearly erroneous and should be reversed since there is 'no constitutional due process entitlement to state-court appeal, and assistance of counsel being a due process right which does not exist at appeal (it exists only at trial) . . . it is clear that petitioner suffered no constitutional deprivation when his state appeal was lawfully dismissed.'

"We believe, however, that the contentions of Kentucky's legal representative in this case are mistaken.

"While it is perfectly true that under the Federal Constitution no state is required to create an appellate system for persons convicted in lower courts of crime, *McKane* v. *Durston*, 153 U. S. 684 (1894), this holding does not extend to exclude federal habeas corpus review of violations of the Fourteenth Amendment occurring in the course of appellate proceedings created by state law. The cases which may be cited on this score are numerous. *Griffin* v. *Illinois*, 351 U. S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956); *Smith* v. *Bennett*, 365 U. S. 708, 81 S. Ct. 895, 6 L. Ed. 2d 39 (1961); *Draper* v. *Washington*, 372 U. S. 487, 83 S. Ct. 774, 9 L. Ed 2d 899 (1963); and *Ross* v. *Moffitt*, 417 U. S. 600 (1974).

"In this instance there is no doubt but that appellant lost his right to appeal when as found by the District Court, 'his retained attorney failed to file a statement of Appeal.'

"In this case it should be noted that Kentucky's Constitution was amended to provide for at least one appeal as a matter of right as of January 1, 1976 before defendant's conviction. See Section 115, Constitution of Kentucky. *See also Blankenship* v. *Commonwealth of Kentucky*, App. 554 S. W. 2d 808 (Ky. App. 1977).

"We recognize that counsel did file an appellate brief which he contends contained the 'essentials' of Kentucky's Rule of Appellate Procedure 1.005(a)(1). He also concedes that he did not file the Statement of Appeal provided for by R.A.P. 1.005(a)(1). . . .'

'The then Kentucky Rule of Appellate Procedure 1.005(a)(1) provided:

> The appellant shall serve and file with the record on appeal a statement of appeal. . . . The statement . . . shall contain the following:
>
> (1) The same information as required in a statement of appeal in the Supreme Court pursuant to RAP 1.030.
>
> • • •

RAP 1.030 provided:

> In all cases the appellant shall file with the record on appeal a statement setting forth:
>
> (a) The name of each appellant and each appellee (only parties named are before the court—'et al.' and 'etc.' are not proper designations of parties).

(Footnote Continued on Next Page)

"The District Judge's findings of fact are not clearly erroneous. We agree with his conclusion that petitioner 'was denied the effective assistance of counsel.'

"The judgment of the District Court is affirmed."

This Court granted the petition for a writ of certiorari on April 23, 1984.

SUMMARY OF ARGUMENT

There is no due process right guaranteed by the Constitution to appeal from a criminal conviction in either the courts of the states or of the United States. Nevertheless, states may provide for appeals upon such terms, circumstances or conditions as they in their absolute discretion and wisdom deem proper. They may allow appeals under the strict condition of following rules of appellate procedure, and of dismissing those appeals should the procedure not be followed. Dismissal of the state appeal may be without the consent of the criminal appellant, and dismissal may be based upon an act or omission of retained appellate counsel. Kentucky has provided such a conditional system of appeal, even though not required to do so by the Constitution of the United States, and has dismissed respondent's appeal based upon failure of retained appellate counsel to follow the rules of procedure, as the Constitution allows.

Appeal was unknown at the adoption of the Sixth Amendment, and is not required by common law due process or by constitutional due process. Appeal is not a requirement of the Constitution and therefore is no part of trial, of the "criminal prosecution" to which the right of counsel attaches under the Sixth Amendment. Had appeal been part of trial, the Constitution would have so provided. Accordingly, the right of trial counsel guaranteed by the Sixth Amendment does not apply to appellate counsel. Counsel on appeal cannot rise to greater prominence than appeal itself, and since appeal is without constitutional basis, there also is no constitutional due process basis for counsel on appeal or for effective counsel on appeal, as there is at fundamental trial.

(Footnote continued from preceding page)

(b) The name and address of counsel for each appellant and each appellee.

(c) The name and address of the trial judge.

(d) The date the judgment appealed from was entered, and the page of the record on appeal on which it may be found. In civil cases the date of judgment shall be the date the clerk made the notation required by CR 77.04(2). In criminal cases the date of judgment shall be the date the clerk served the notice required by RCr 12.16 as shown by his endorsement on the retained copy of the notice.

(e) The date the notice of appeal was filed and the page of the record on appeal on which it may be found.

(f) Each of the following facts, if any, as are true:

(1) a notice of cross-appeal has been filed;

(2) a supersedeas bond has been executed;

(3) any reason the appeal should be advanced;

(4) this is a suit involving multiple claims and judgment has been made final under CR 54.02;

(5) there is another appeal pending in a case which involves the same transaction or occurrence, or a common question of law or fact, with which this appeal should be consolidated, giving the style of the other case;

(6) the appellant is free on bond.

While there is a limited equal protection right under the Fourteenth Amendment to appeal and to counsel on appeal under appropriate facts determined on a case-to-case basis, there is no due process right. The parties have stipulated that equal protection is not present here. Fourteenth Amendment equal protection is limited to providing to poor people minimally the same access to appeal and to counsel on appeal as may be enjoyed by criminal appellants of means. This in no way declares, however, that appellants of means have any constitutional entitlement to appeal or to counsel on appeal beyond what the state and only the state provides for. Rather, equal protection recognizes the practical reality that if persons of means can enjoy access to appeal and appellate counsel simply because of their means, then persons without means must have minimally similar access. However, it then also recognizes that the appeal of the indigent with access can be dismissed just as the appeal of the non-indigent can be dismissed for failure of counsel to follow a neutral rule neutrally applied.

The right to counsel at trial under the Sixth Amendment is applied to the states via Fourteenth Amendment due process. Trial is constitutionally fundamental to liberty. Appeal is not. Therefore, there can be no right to appellate counsel arising independently out of the Sixth Amendment itself. The Constitution does not require counsel on appeal any more than it requires appeal itself.

Fundamental trial and non-fundamental appeal are significantly different. The state initiates the criminal

prosecution to convert an accused who is presumed innocent to one found guilty beyond a reasonable doubt. The accused needs an attorney to act as his shield of protection and defense against the efforts of the state. By contrast, it is the now-guilty criminal appellant who typically initiates appeal. He does this not to fend off the efforts of the prosecutor but rather to overturn the finding of his own guilt. He attacks the state on appeal, and his appellate attorney wields the sword of attack. The core purpose of the counsel guarantee of the Sixth Amendment to assure assistance of counsel at trial — to aid the defense of the accused at the criminal prosecution — has no constitutional application to appeal. Most of the states have adopted rules for dismissal of appeals, and the appellate courts of the United States have rules which provide for dismissal of appeals in their own jurisdiction. These rules are a practical manifestation that appeal is not a requirement of the Constitution and that appeals are not necessary for fair trial. Were they required or were they part of trial, they could not be done away with against the wishes of a criminal appellant, any more than can trial be dispensed with and guilt established without the consent of the accused.

Kentucky's rules of dismissal accord with the Constitution. The Sixth Circuit erred by finding a Fourteenth Amendment due process right to effective assistance of state appellate counsel, and by effectively overturning dismissal of the state appeal for failure to follow state rules. Following the rules is the terms, circumstances and conditions which Kentucky in its

own absolute discretion and wisdom has attached to its non-fundamental grant of appeal to a person adjudged guilty of a crime. Such discretion and wisdom is not to be inquired into, for it is the state's decision alone to make.

ARGUMENT

Dismissal by the Court of Appeals of Kentucky of Respondent's State Appeal, Pursuant to Neutral Rule Which Operated Neutrally Upon Appellate Counsel's Default, Did Not Violate Any Part of the Constitution. Specifically, There Is No Constitutional Right to Appellate Counsel or of Effective Assistance of Appellate Counsel as There Is to Trial Counsel. Dismissal of a State Appeal Does Not Implicate Effective Assistance of Appellate Counsel Any More Than Does Dismissal of a United States Appeal.

A. THERE IS NO CONSTITUTIONAL RIGHT TO STATE APPEAL.

Without dispute, there is no constitutional due process right to an appeal in either state or federal jurisdiction. Constitutionally, then, state courts may dismiss appeals from criminal convictions for failure to follow their appellate rules of procedure, even when dismissal results from an act or omission of retained appellate counsel. This is because there is no due process right under the Constitution to counsel on state appeal or to effective assistance of appellate counsel on state appeal, any more than there is a due process right to appeal itself.

Fourteenth Amendment equal protection is not implicated under the facts here, by stipulation of the

parties (J.A. 58a, 61a, 64a). In fact, there is a great constitutional void between trial and appeal, and due process trial rights simply do not exist upon appeal.

In affirming relief to respondent Lucey by finding a Fourteenth Amendment due process right to effective assistance of state appellate counsel, the Sixth Circuit misconstrued and misapplied all five opinions of this Court which it identified. The Sixth Circuit also overlooked a number of pertinent opinions of this Court which petitioners cited. Moreover, the court of appeals mistakenly found that Kentucky provides an absolute right to appeal. The effect of the decision below is to say that neither Kentucky nor any other state may dismiss an appeal for failure to follow their rules of appellate procedure.

This is contrary to the Constitution, as well as the actions and wisdom of the states themselves and of this Court. It appears that at least 43 states plus the District of Columbia have provided in some manner for dismissal of criminal appeals. (See authority cited in appendix at end of this brief, and argument *infra* at pp. 37-40.) This means that the states themselves have perceived no constitutional impediment to dismissal of appeals.

Moreover, it is undisputed and unremarked upon by either United States court below that this Court and the courts of appeals of the United States can dismiss appeals based upon failure of appellate counsel to follow appellate rules. See, for example, Rules 16.1 and 33.7 of this Court and 31(e) of the Federal Rules

of Appellate Procedure.[4] These rules of dismissal, presumably, do not offend the Constitution. That being so, why should state rules of dismissal offend the Constitution? (This point was early asserted by petitioners in the District Court—see J.A. 51a, at 56a).

Therefore, an egregious contradiction exists upon the face of state and federal rules should the opinion below go uncorrected. That is, United States courts may constitutionally dismiss appeals, but if state courts dismiss appeals in the same way that action is unconstitutional.[5] Much more directly to the point, however,

[4]Rule 16.1 allows appeals to be dismissed, among other reasons, for failure to take them in conformity with statute or rules of court. Rule 23.7 also allows dismissal for non-compliance with the Rule, and dismissal even may occur as a sanction. F.R.A.P. 31(c) allows dismissal of an appeal for failure under the Rules to timely file a brief. Respondent's appeal was dismissed for failure to follow state rules.

This inconsistency in constitutionally allowing dismissal of federal appeals and constitutionally condemning dismissal of state appeals also is a clear violation by the court below of the principles of comity and federalism required by such opinions as *Francis* v. *Henderson*, 425 U. S. 536 (1976). That is, dismissal of federal appeals is said to be constitutionally correct while dismissal of state appeals is said to be constitutionally incorrect.

[5]Rules of dismissal will be used. See, for example, in the United States Courts of Appeals, *United States* v. *Lynch*, 419 F. 2d 366 (4th Cir. 1970). For this Court, for example, see Justice Clark's dissent in *Douglas* v. *California*, 372 U. S. 353, at 356-359 (1963). The majority did not deny the dissent's statements that this Court summarily dismissed all but one of 44 *in forma pauperis* appeals, that some of those were "appeals of right" and that this Court had dismissed the appeals "on the moving papers alone." The dissent contrasted these indigency dismissals with the Court's practice for paid appeals, at p. 358.

is that the Constitution allows dismissal of appeals without the consent of a convicted appellant.

The opinions which were misconstrued and misapplied by the Sixth Circuit are *Griffin* v. *Illinois*, 351 U. S. 12 (1956); *Smith* v. *Bennett*, 365 U. S. 708 (1961); *Draper* v. *Washington*, 372 U. S. 487 (1963); *Ross* v. *Moffitt*, 417 U. S. 600 (1974); and *McKane* v. *Durston*, 153 U. S. 684 (1894).[6]

The court below correctly stated that *McKane* v. *Durston* establishes that no state is required to create an appellate system for persons convicted in lower courts of crime. The court below then erred in concluding that *McKane* v. *Durston's* holding "does not extend to exclude federal habeas corpus review of violations of the Fourteenth Amendment occurring in the course of appellate proceedings created by state law." This overlooks the explicitly stated reality of *McKane* v. *Durston* which is that appeals may be allowed under

[6]The court below even contradicted its own recent opinion in *Hollin* v. *Bowders*, 710 F. 2d 264 (6th Cir. 1983), another opinion not mentioned by the court below. *Hollin* acknowledges at p. 267 that "Such rights as the Supreme Court has conferred to date with respect to appellate counsel have rested on the *equal protection* basis that where state law permits a defendant of means to be represented by retained counsel on appeal, *equal protection* concepts of the Fourteenth Amendment require a similar right be accorded the indigent defendant. • • • Clearly different considerations affect the right to *effective* assistance of counsel at the *trial and appellate stages*. • • • While historically there has never been, as such, a constitutional right to appeal, • • • the right to trial and hence the right to *effective* assistance of appointed counsel at trial is fundamental to the constitutional system." (emphasis added, citations deleted).

any terms or circumstances or conditions the state—and only the state in its own discretion and wisdom—deems appropriate. This includes provision for dismissing appeals for failure to follow rules. And such conclusion of the court of appeals overlooks another reality, which is that *McKane* v. *Durston* explicitly states that appeal was not and is not a necessary element of due process of law.

To quote directly from *McKane* v. *Durston*, at 153 U. S. pp. 687-688:

> An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, *was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion* of the State to allow or not to allow such a review. A citation of authorities upon the point is unnecessary.
>
> *It is, therefore, clear that the right of appeal may be accorded by the State to the accused upon such terms* as in its wisdom may be deemed proper. • • • [W]*hether an appeal should be allowed, and if so, under what circumstances or on what conditions, are matters for each State to determine for itself.* (emphasis added).

As seen on pp. 40-44, Kentucky by constitutional mandate has created a strictly conditional system of appeal, based upon following certain rules of appellate procedure.

These are the discretionary terms, conditions and circumstances which states may apply to any appeal under *McKane* v. *Durston*.

The court of appeals also misconstrued and misapplied the opinions of *Griffin* v. *Illinois*, *Smith* v. *Bennett* and *Draper* v. *Washington*. These decisions are reached upon grounds of Fourteenth Amendment equal protection rather than due process and involve disparity of treatment between rich and poor appellants and the denial of access to appeal to some criminal appellants solely because of poverty while other appellants of means have access to the appellate process.

As stipulated, no equal protection question exists under the facts of this matter, yet these three opinions stand only for the equal protection reaches of the Fourteenth Amendment. They do not stand for Fourteenth Amendment due process, as an examination of *Ross* v. *Moffitt* will show. *Ross* v. *Moffitt* is the fifth opinion of this Court which the court of appeals misconstrued and misapplied.

Ross v. *Moffitt* is the first apparent attempt by this Court to clarify a generation of improper blurring of Fourteenth Amendment equal protection and due process analysis regarding state appeal, as embodied in the line of cases of *Griffin* v. *Illinois* and *Douglas* v. *California*, 372 U. S. 353 (1963).

The *Griffin-Douglas* line of opinions, without ever identifying and explaining the constitutional source of the asserted appeal right, tend to raise for the first

time the idea that there may be a Fourteenth Amendment due process right to counsel on state appeal, and that it somehow is buttressed or enhanced by equal protection.

Ross v. *Moffitt* at 608-609 takes particular notice of this imprecise analysis and unidentified source of the asserted constitutional right to state appeal:

> The precise rationale for the *Griffin* and *Douglas* line of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment. • • • Neither Clause by itself provides an entirely satisfactory basis for the result reached, each depending on a different inquiry which emphasizes different factors. 'Due process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. 'Equal protection,' on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable. (emphasis added, footnote deleted).

Ross v. *Moffitt*, at p. 611, concludes that the *Griffin-Douglas* lines are equal protection:

> The fact that an appeal has been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way. • • • Unfairness results only if indigents are singled out by the State and denied meaningful access to the

> appellate system because of their poverty. That question is more profitably considered under an equal protection analysis. (emphasis by the court).

The Court went on to observe at p. 612 that "there are obviously limits beyond which the equal protection analysis may not be pressed without doing violence to principles recognized in other decisions of this Court."

Ross v. *Moffitt* supports competely the no-due-process-on-appeal doctrine of *McKane* v. *Durston*, which it cites, and reaffirms that while trial is fundamental to Liberty under the Fourteenth Amendment, appeal is not constitutionally fundamental to Liberty.[5] *Ross* v. *Moffitt* details the *significant differences* between trial and appeal, at pp. 610-611. The purpose of trial is to convert a defendant presumed innocent to one found guilty beyond a reasonable doubt. The purpose of appeal is not to fend off the efforts of the

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[5]The dissent in *Jones* v. *Barnes*, ____ U. S. ____, 77 L. Ed. 2d 987 (No. 81-1794, decided July 5, 1983), challenged this Court's reiteration that there is no constitutional right to appeal, and suggested that this Court upon proper opportunity would turn away from the *McKane* v. *Durston* doctrine. Thus, petitioners have written at length to show the contemporary vitality and bedrock character of *McKane* v. *Durston*. Of course, this Court has reaffirmed *McKane* v. *Durston* in *Barnes*, *Moffitt*, *Abney* v. *United States*, 431 U. S. 651 (1977), and *Wainwright* v. *Torna*, 455 U. S. 586 (1982). In constitutional contemplation, Kentucky's conditional appeal is discretionary within the meaning of *Moffitt* and *Torna* because the appeal is not absolutely of right but is available only if the rules are followed. *Moffitt* and *Torna* say there is no right to counsel on discretionary appeal.

[6]For accord that *Ross* v. *Moffitt* finds no constitutional due process right, see Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 Stanford Law Review 545, at p. 563 (1975).

state's prosecutor but rather to overturn a finding of guilt made by a judge or jury.

The defendant at trial needs an attorney as a shield to protect and defend him. The defendant on appeal uses an attorney as a sword to upset and attack the prior determination of guilt. "This difference is significant for, while no one would agree that the State may simply dispense with *the trial stage* of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all," *Ross* v. *Moffitt* at p. 611.* (emphasis added).

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*To quote *Moffitt* directly, this Court stated,

> At the trial stage of a criminal proceeding, the right of an indigent defendant to counsel is fundamental and binding upon the States by virtue of the Sixth and Fourteenth Amendments. *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). But there are significant differences between the trial and appellate stages of a criminal proceeding. The purpose of the trial stage from the State's point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt. To accomplish this purpose, the State employs a prosecuting attorney who presents evidence to the court, challenges any witnesses offered by the defendant, argues rulings of the court, and makes direct arguments to the court and jury seeking to persuade them of the defendant's guilt. Under these circumstances 'reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.' *Id.* at 344.
>
> By contrast, it is ordinarily the *defendant*, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or jury below. The defendant needs an attorney on appeal not as a shield to protect

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Finally, *Ross* v. *Moffitt* observes that "it would be odd, indeed, to read the Fourteenth Amendment to impose" requirements on the states but not upon the United States, pp. 617-618.

Ross v. *Moffitt*, then, is the first step by this Court to correct the *Griffin-Douglas* blurring of due process and equal protection on appeal, and to adhere to the *clear teaching of McKane* v. *Durston* regarding state appeal procedures.

All this is to say that whatever a state does or does not do on appeal—whether or not to have an appeal and if so, how to operate it—is of no due process concern to the Constitution or to United States habeas corpus courts.

In support of *McKane* v. *Durston's* holding that a state defendant who is convicted of a serious criminal offense has no due process right whatsoever under the Constitution to state appellate review, except to whatever conditional appellate review the states may allow, petitioners also cite *Andrews* v. *Swartz*, 156 U. S. 272, at 275 (1895); *Kohl* v. *Lehlbach*, 160 U. S. 293, at 297, 299 (1895); *Murphy* v. *Massachusetts*, 177 U. S. 155, at 158 (1900); *Brown* v. *Allen*, 344 U. S. 443, at 464-466 (1953); *Ortwein* v. *Schwab*, 410 U. S.

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> him against being 'haled into court' by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt. This difference is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all. *McKane* v. *Durston*, 153 U. S. 684 (1894).

656, at 660 (1973); and *Estelle* v. *Dorrough*, 420 U. S. 534, at 536 (1975).[20]

Neither is there a right of the Constitution for appeal from a conviction of a serious offense prosecuted in the courts of the United States. Such federal appeal is not constitutional but statutory. See, for example, *Heike* v. *United States*, 217 U. S. 423, at 428 (1910); *Bradford* v. *Southern R. Co.*, 195 U. S. 243, at 250 (1904); *United States* v. *Perrin*, 131 U. S. 55, at 57 (1889); *Forsyth* v. *United States*, 9 How 571, at 572 (1850); *Cotton* v. *United States*, 9 How 579, at 580 (1850); and *Abney* v. *United States*, 431 U. S. 651, at 656 (1977).

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[20]The Fourteenth Amendment does not draw to itself the provisions of state constitutions or state law, even at criminal trials. State law is not reviewable by federal courts, *Bucklew* v. *New York*, 319 U. S. 427, at 429, 431 (1943). The law of state appeal, not being a constitutional due process requirement, is unreviewable state law. This is why, even at the fundamental *trial* level, the procedures of a state do not violate the Fourteenth Amendment simply because another method may seem to federal courts to be fairer or wiser or to give a surer promise of protection to a defendant. *Snyder* v. *Massachusetts*, 291 U. S. 97, at 105 (1934) and *Spencer* v. *Texas*, 385 U. S. 554, at 564 (1967).

State judges as well as federal judges swear allegiance to the Constitution of the United States, and there is no reason to think that state judges are not doing their mortal best to discharge their oath of office, *Sumner* v. *Mata*, 449 U. S. 539, at p. 549 (1981). Even where federal prosecutions raise questions about trial counsel, courts of the United States are told to consider only the commands of the Constitution and what it compels, not what is deemed prudent or appropriate, *United States* v. *Cronic*, ____ U. S. ____, 52 L. W. 4360, n. 20 at p. 4364 (No. 82-660, decided May 14, 1984).

Abney states the federal jurisdiction reality just as explicitly as *McKane* sets forth the state jurisdiction reality:

> We approach the threshold appealability question with two principles in mind. First, it is well settled that there is no constitutional right to an appeal. *McKane* v. *Durston*, 153 U. S. 684 (1894). Indeed, for a century after this Court was established, no appeal as of right existed in criminal cases, and, as a result, appellate review of criminal convictions was rarely allowed.[3] As the Court described this period in *Reetz* v. *Michigan*, 188 U. S. 505 (1903):
>
> '[T]rials under the Federal practice for even the gravest offenses ended in the trial court, except in cases where two judges were present and certified a question of law to this court.' Id., at 508.
>
> The right of appeal, as we presently know it in criminal cases, is purely a creature of statute; in order to exercise that statutory right of appeal one must come within the terms of the applicable statute—in this case, 28 U.S.C. § 1291.
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> • • •

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[3]Appeals as of right in criminal cases were first permitted in 1889 when Congress enacted a statute allowing such appeals 'in all cases of conviction of crime the punishment of which provided by law is death.' Act of Feb. 6, 1889, 25 Stat. 656. A general right of appeal in criminal cases was not created until 1911. Act of March 3, 1911, 36 Stat. 1133.

That this is the settled law of the Constitution is acknowledged by the scholars. As stated in Scott,

Two Models of the Civil Process, 27 Stanford Law Review 937, at 945 (1974-1975):

> B. Appeals and Due Process
>
> Let me turn from an area of current controversy and unsettled doctrine to one of the most firmly stablished landmarks in the shifting sands of procedural due process—the proposition that a right of appeal from a trial court judgment is never constitutionally guaranteed. As stated by the Supreme Court in 1894 in *McKane* v. *Durston*, '[a] review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law.' This view of the requirements of the 14th amendment due process clause in a state criminal case has been regularly cited ever since with approval, and applies with equal force to the federal government under the 5th amendment. (footnotes omitted).

To the same effect, see Westen, *Forfeiture by Guilty Plea — A Reply*, 76 Michigan Law Review 1308, at 1319, n. 42 (1977-78), and Dix, *Appellate Review of the Decision to Impose Death*, 68 Georgetown Law Journal 97, at 106, n. 77 (1979-80).

Westen notes that this Court has said in the past and insists today that a defendant has no constitutional right to an appeal, citing *McKane* and *Abney*. Dix notes what he calls the general hostility of this Court to the proposition that there is a constitutional right to appellate review.

Thus, whatever state courts do about dismissing appeals does not offend the Constitution. The Constitution does not embrace such appeal in *any* due process fashion. Thus, no relief, constitutionally, can be granted to petitioner in a federal habeas corpus court, for the dismissal of his state appeal. The states may provide no appeal at all, or they may provide a conditional appeal which *McKane* v. *Durston* says cannot be inquired about on grounds of due process by a habeas corpus court. Since appellate counsel is subordinate or ancillary to the non-fundamental grant of appeal itself, assistance of appellate counsel can rise to no greater due process status than the appeal itself. That is, the Constitution does not require counsel on non-fundamental appeal any more than it requires appeal itself.

B. THERE IS NO CONSTITUTIONAL RIGHT TO COUNSEL OR EFFECTIVE ASSISTANCE OF COUNSEL ON STATE APPEAL.

As to appellate counsel, a reading of the Sixth Amendment, even without reference to the Fourteenth Amendment, clearly shows that while the Sixth Amendment does guarantee an accused the assistance of counsel for his defense in all criminal prosecutions at trial, the amendment does not guarantee a right of counsel on appeal.

The Sixth Amendment provides:

> In all *criminal prosecutions*, the *accused* shall enjoy the right to a speedy and public *trial*, by an impartial jury of the State and district wherein

> the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his *defence*. (emphasis added).

Therefore, in order for there to be a Sixth Amendment right to counsel on appeal, somehow independent of the Fourteenth Amendment, appeal of necessity would have to be part of the criminal prosecution of the accused at trial. Appeal, however, is not part of the trial's criminal prosecution for Sixth Amendment purposes. *McKane* v. *Durston* and *Ross* v. *Moffitt* affirm there is no due process necessity of non-fundamental appeal and affirm that there are significant differences in trial and appeal. The right to counsel provisions of the Sixth Amendment therefore are not constitutionally applicable to the appeals process. The right to trial counsel is due process, *Powell* v. *Alabama*, 287 U. S. 45 (1932), and due process does not exist on state appeal. Indeed the Sixth Amendment counsel guarantee at trial is applied to the states through the Fourteenth Amendment, not independently, *Gideon* v. *Wainwright*, 372 U. S. 335 (1963).

Of course, when the Sixth Amendment was ratified, there was no appeal right, either constitutional or otherwise. The *statutory* right to appeal *federal* trial convictions did not come into being until 1889, *Abney* v.

United States, *supra*. See, as well, *Carroll* v. *United States*, 354 U. S. 394, n. 9 (1957).

If appeal were part of trial the Constitution would require appeal instead of not requiring it. But the Constitution does not require appeal or appellate counsel. Appeal, therefore, is not part of trial, and neither due process rights or somehow newly-discovered independent Sixth Amendment rights exist on appeal. To force states to grant appeals contrary to their own rules would be to raise purely state matters to constitutional level, contrary to the above and other authority of this Court.

The appeal dismissal and the default leading to it about which respondent Lucey complained occurred in state appellate court long after jurisdiction had left the state trial court and attached under non-fundamental circumstances in the appellate court.[11] See *Hoy* v. *Newbury Homes, Inc.*, Ky., 325 S. W. 2d 301, 302 (1959).

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[11] In his petition for writ of habeas corpus, respondent Lucey raised seven separate claims of constitutional deprivation—including all three of the claims he raised in his brief on appeal in the Court of Appeals of Kentucky. Mr. Lucey received no relief whatsoever in the United States District Court on any of these claims except for the one dealing with denial of effective assistance of counsel on appeal. (See his petition in record at 3a, 4, 4a, 5, and 5a, and see judgment of District Court at J.A. 43a-44a.) Mr. Lucey thereafter did not pursue in the United States courts any of these other claims, including the three claims raised in his state appellate brief. Respondent's ultimate complaint appears to be that his *trial* was constitutionally unfair. That being so, it is difficult to understand why he is pursuing allegations of appellate error, and not pursuing allegations that the United States habeas

(Footnote Continued on Next Page)

Constitutionally, logically and historically, therefore, since the concept and reality of appeal was unknown to the Sixth Amendment at its ratification, appeal clearly is no part of the trial's criminal prosecution, and the assistance of counsel provision of that amendment cannot apply to the non-fundamental appellate process.

On appeal, the accused is no longer the accused. He is guilty. On appeal, he no longer is using counsel in his defense. He is attacking his criminal status. On appeal, his physical presence is not required. At trial, his physical presence is required. Trials are public. Appellate proceedings for the most part are not public. The criminal prosecution has concluded. It is the criminal appellant who prosecutes the independent appeal. Thus, while no one would argue that a state may dispense with trial without the defendant's consent, it is clear that a state need not provide any appeal at all, and that if it does, may accord the appeal upon such terms, circumstances and conditions as it alone in its wisdom and discretion deems proper, including dismissal of appeal, *McKane* v. *Durston*. Appeal is not a constitutionally fundamental protection to life, liberty or property. Neither is the assistance of appellate counsel.

(Footnote Continued From Preceding Page)

corpus court improperly failed to grant relief on his claims in that court of trial error. Habeas corpus courts should be restricted to review of claims of constitutional error at the "criminal prosecution," and not at non-fundamental appeal.

Significantly, the holding in *Douglas* v. *California* that a state must furnish counsel to an indigent appellant did not rest upon the Sixth Amendment right to counsel, which Amendment was made applicable to the states in the trial arena by *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), decided the same day. This is simply because the Sixth Amendment does not apply to the appellate stage of its own force. It can apply only through Fourteenth Amendment due process, and due process does not exist upon appeal.[10]

This Court, moreover, has always applied the Sixth Amendment guarantee of counsel to the trial or for his defense. "The core purpose of the counsel guarantee was to assure 'Assistance' at trial • • •," such assistance being "for his defense," *United States* v. *Cronic*, — U. S. —, 52 L. W. 4560, 4561, No. 82-660 (May 14, 1984), a federal prosecution. See, as well, *Strickland* v. *Washington*, — U. S. —, 52 L. W. 4565 (No. 82-1554, decided May 14, 1984), where the Sixth Amendment was discussed in terms of trial, defense and, at p. 4570, "ample opportunity to meet the case of the prosecution."

In light of all of the above, it cannot reasonably be argued that appeal is a critical stage of trial, which thereby calls for assistance of counsel. If it were, the Constitution would require appeal. It does not. Can appeal, then, through so-called historical expansion, itself be expanded into a "trial-like" confrontation,

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[10]The Sixth Circuit and the District Court nevertheless found a Fourteenth Amendment due process right to the effective assistance of appellate counsel (J.A. 64a-65a).

see *United States* v. *Ash*, 413 U. S. 300, at 311-312 (1973). This argument, too, must fail. *Ash* itself refused to expand counsel guarantees into a new area of the trial proceedings, and *Ash* itself at p. 309 determined that "historical background suggests that the core purpose of the counsel guarantee was to assure 'Assistance' at trial • • •," trial being used in its historical meaning of *criminal prosecution* of an *accused*.

For the reasons already shown, appeal is not trial-like and in fact is significantly different than trial. And *Ash* spoke from the perspective of a federal prosecution, not a habeas corpus inquiry into a non-fundamental state appellate matter. While federal appeals by statutory provision are described as being "a matter of right," *Hardy* v. *United States*, 375 U. S. 277 at 278 (1964), Kentucky's appeals system is not absolute but is strictly limited and conditional. See discussion *infra* at pp. 40-44.

Thus, to attribute "trial-like" qualities to a state appeal, and for the first time to apply the Sixth Amendment to appeals independent of due process, would be to overturn in a twinkling what is long-settled bedrock constitutional exposition by this Court.

In reality, this Court effectively approves dismissal of state appeals based upon failure to follow procedural rules but it does so in a different context where the default by counsel occurs not in the appellate court but in the trial court. This is where *trial* counsel fails to preserve a claim of error for appellate review by failing to comply with a state's contemporaneous objection

rule. Thus, the refusal of the state appellate court to review an issue not preserved at trial is in *practical* effect a dismissal of the appeal for that one issue. This Court defers to such "dismissal" even as to a constitutional claim simply out of respect for state procedures and the valid and important policy reasons served thereby, and itself will not intervene except in very extreme circumstances, *Wainwright* v. *Sykes*, 433 U. S. 72 (1977).[18]

Under the *Sykes* rule, of course, the default which leads to refusal to hear the claim on appeal is made by trial counsel at trial. In the present action, the default was by appellate counsel on appeal. Trial counsel's duties or effective assistance at constitutionally-required trial have been set forth countless times. Yet appeal is not constitutionally fundamental or required to vindicate due process, nor is counsel on appeal. In light of *Sykes*, how then can it ever be reasonably or constitutionally said that states cannot dismiss an appeal based upon appellate counsel's default?

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[18] *Engle* v. *Isaac*, 456 U. S. 107, at 130 (1982), declined to retreat from this position.

> In *Wainwright* v. *Sykes* • • • we held that a state prisoner, barred by procedural default from raising a constitutional claim on direct appeal, could not litigate that claim in a §2254 habeas corpus proceeding without showing cause for and actual prejudice from the default. Applying the principle of *Sykes* to these cases, we conclude that respondents, who failed to comply with an Ohio rule mandating contemporaneous objections to jury instructions, may not challenge the constitutionality of those instructions in a federal habeas proceeding.

Petitioners wish to make clear that the two examples are constitutionally unalike. Trial and trial counsel are constitutionally required. Appeal and appellate counsel are not constitutionally required. The *Sykes* deference is a matter of comity, even though a constitutional matter exists. However, no constitutional matter exists regarding state appeal. Petitioners merely remark upon the effective and practical reality that appeal under the *Sykes* rule can be foreclosed — i.e., dismissed — by trial counsel's default as to the one constitutional claim involved.

Therefore, dismissal of an appeal itself should not under any circumstances be reviewable under a §2254 habeas corpus proceeding. ***Respondent here is not in custody in violation of the Constitution, as regards dismissal of his appeal. He is in custody because of his guilt as established at trial.***[14] See *Brown* v. *Allen*, 344 U. S. 443, 486, n. 36 (1953), where the state court refused to review a conviction in a capital case after counsel of appellant's choosing who was recognized by North Carolina as competent failed to timely perfect the appeal. This Court at pp. 485-486 determined that due process was not violated by the state's refusal to review the conviction even though the failure to perfect was by only one day and even though the appeals court had the full trial record and statement on appeal before it and had discretion to hear the appeal on the merits. "We cannot say that North Carolina's action

[14]It should be understood that the Sixth Circuit granted relief to respondent from his *trial* conviction on the ground of a much later claim of appellate error.

in refusing review • • • violates the Federal Constitution. A period of limitation accords with our conception of proper procedure." This Court also observed that habeas corpus is authorized only when a state prisoner is in custody in violation of the Constitution. Respondent's failure to follow state appellate rules is of no constitutional concern to a United States habeas corpus court, even when the rule of dismissal is strictly and literally enforced in a setting of great discretion. *Brown*, citing *McKane* v. *Durston*, refutes the Sixth Circuit's belief (J.A. 65a-66a) that *McKane* does not exclude federal habeas corpus review of violations of the Fourteenth Amendment which occur in the course of appellate proceedings created by state law.

Recently, in *Wainright* v. *Torna*, 455 U. S. 586, 588 (1982), no state action was implicated when retained counsel failed to timely file a petition on discretionary appeal. Deprivation was caused by counsel, not the state.

The *Torna* facts are analogous to the dismissal here. Kentucky's appeal is discretionary in that it is based upon following the conditions of the appellate rules mandated by §116 of the Kentucky Constitution. There is no appeal if the rules are not followed. It is not absolutely of right but conditionally of right. Therefore, since respondent here had no constitutional right to counsel on appeal any more than he had a constitutional right of appeal, he could not be deprived of the effective assistance of appellate counsel by his re-

tained counsel's failure to follow the rules any more than could Mr. Torna.[16]

Any right to appellate counsel on appeal arises from Fourteenth Amendment equal protection. However, to say that indigents are entitled to at least minimally the same level of assistance of counsel on appeal as are non-indigents does not mean that non-indigents themselves are constitutionally entitled to counsel on appeal or to effective assistance of counsel on appeal. It only means there can be no disparate treatment of indigents, and that if non-indigents have access to the appellate process then indigents must be given the same sort of access. Accordingly, *Anders* v. *California*, 386 U. S. 738 (1967), stands only for the equal protection proposition that an indigent cannot be denied a forceful advocate on appeal if non-indigents have forceful advocates on appeal. It does not stand for the propo-

[16]The apparently opposite constraints on state action in *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980), may be distinguished on the ground that it involves failings of retained counsel at trial, not appeal, due to a conflict of interest. A criminal trial ends in the trial court upon the entry of judgment and imposition of sentence, *Kurtz* v. *Michigan*, 135 U. S. 548, 550 (1890), and an appeal is taken after the conclusion of the "criminal prosecution," including imposition of sentencing and judgment. Appeal is not a part of the criminal prosecution, and the full panoply of rights due to a defendant at the criminal prosecution does not apply thereafter, *Moriarty* v. *Brewer*, 430 U. S. 471, 480 (1972). It is then the guilty and convicted appellant who prosecutes the appeal, not the state which has prosecuted the trial, *Ross* v. *Moffitt*, supra. The state is not responsible for appellate counsel's default. Thus, as in *Torna*, supra, at Torna's own n. 4, "Such deprivation—*if* even implicating a due process interest—was caused by his counsel, and not by the State."

sition that there is a due process constitutional right for advocacy of any kind on appeal.

Here, respondent is entitled only to the procedure which Kentucky offers on appeal, in terms of the Constitution. To force the state to grant an appeal in disregard of its conditional rules would be to force review of purely state questions, contrary to 28 U.S.C. §2254.[17]

C. MOST STATES HAVE PROVIDED FOR DISMISSAL OF CRIMINAL APPEALS.

It appears that at least 43 states plus the District of Columbia have provided in some manner for the dismissal of a criminal appeal without the appellant's consent, based upon an appellate procedural default. (An alphabetical listing of such dismissal authority is presented in the appendix directly at the close of this brief). Accordingly, it appears that the states themselves have perceived no constitutional impediment to dismissal of criminal appeals based upon failure to follow appellate rules. Thus, Kentucky is not unique in providing for dismissal of appeals.

Grounds for dismissal are various. For example, they include failure to comply with appellate rules

[17]According to the Sixth Circuit opinion also would result in heavy new societal and judicial administration costs whose extent can only be guessed at. An entire new arena for attacking the conviction would be created. Appeal would become part of trial and appellate counsel perhaps would be measured by the standards of trial counsel. Litigation will increase, delay will increase, judicial burdens will increase and finality will be even a more distant hope than it now is. All of this would be for a new right of the Constitution never before recognized or needed, and would result in major upheaval of what now is bedrock constitutional exposition.

generally, failure to timely cause transmission of the record or transcript, failure to timely docket the appeal, and failure to timely file appellant's brief.

As examples, Alabama has provided for dismissal for failure to timely complete the record on appeal, for failure to timely file a brief, or for failure to comply substantially with the rules. California has provided for dismissal for failure to procure the record on appeal and for failure to timely file the appellant's brief. Montana similarly has provided for dismissal. Vermont has provided for dismissal for failure to timely file appellant's brief.

New York has provided for dismissal, again of a criminal appeal, for failure to timely prosecute the appeal, for failure to timely file the record, brief or appendix and for failure to comply with the rules. New Mexico has provided for dismissal for failure to comply with the appellate rules. Kansas has provided for dismissal of appeals for substantial failure to comply with the appellate rules. Kentucky presently provides for dismissal of appeals for failure to prosecute the appeal in conformity with the rules.

Due to considerable time constraints, petitioners do not suggest that the various states always construe these rules in the same strict or liberal way. What petitioners do find significant is that the states overwhelmingly have provided for dismissal of criminal appeals and obviously see no constitutional prohibition. In fact, the states must believe the Constitution allows such dismissal, and obviously must believe that they are free to add such conditions to their own grants

of appeal as they in their own wisdom see fit. Petitioners also submit that the number of states which have provided for dismissal may be understated.

For example, it arguably appears that Texas may have provided for dismissal of appeals for failure to comply with the appellate rules. Rule 387(a), (b) of the Texas Rules of Procedure for the Court of Civil Appeals (not to be confused with Rule 387a(a), (b)) provides that appeals are subject to dismissal for failure to comply with any requirements of the rules. Rule 211 of the Court of Criminal Appeals provides that civil rules shall govern proceedings in criminal appeals where not inconsistent with the criminal rules or the Code of Criminal Procedure. The Texas Code of Criminal Procedure at §§44.09, 44.14, 44.22 and 44.33 provides specific inconsistencies. However, the Code does not appear to provide blanket inconsistencies and at §44.24(b), as amended, provides that the Court of Criminal Appeals may enter any appropriate order as may be required. This would appear to include dismissal of the appeal. However, Texas has not been listed as a state which has provided for dismissal, out of caution.

Maine is not so listed, because it has a state policy against dismissal for want of proper procedure if the record of the case presents the merits of the appellate claim, 2 Maine Rev. Stats. Anno., Title 4, §57. This is a state policy which Maine recognizes is not a constitutional requirement, *Varney* v. *Look*, Me., 377 A. 2d 81 (1977), citing *Harrington* v. *Harrington*, Me., 269 A. 2d 310 (1970), which at pp. 313-314 noted the limited

equal protection aspects under the Constitution for appellate review. Thus, it appears that Maine finds no constitutional prohibition against dismissal of appeals. It simply has chosen to go its own way and not dismiss. The Constitution, of course, also allows that approach.

D. KENTUCKY HAS GRANTED ONLY CONDITIONAL APPEAL, AND HAS NOT GRANTED ABSOLUTE APPEAL AS OF RIGHT.

The Sixth Circuit misconstrued and misapplied the constitutional law of Kentucky as regards appeals. The court below found that respondent Lucey had a right — an absolute right — to state appeal.

In fact, the *very most* which any person in Kentucky has after conviction is a conditional opportunity or conditional right to pursue an appeal strictly according to the Kentucky rules of appellate procedure. See Constitution of Kentucky, §§115-116, and *Foremost Ins. Co.* v. *Shepard*, Ky., 588 S. W. 2d 468 (1979), and *Stahl* v. *Commonwealth*, Ky., 613 S. W. 2d 617 (1981).[17]

Section 115 provides for appellate rights generally, while §116 gives appellate rule-making power to the Supreme Court of Kentucky. In *Foremost* (which embraces a criminal as well as civil appeal), the Supreme Court of Kentucky stated in regard thereto:

> It is our opinion, however, that the right of appeal guaranteed by Section 115 may be conditioned upon strict adherence to orderly rules of procedure. 'Substantive rights, even of constitutional magnitude, do not transcend procedural rules, because without such rules those rights would smother in chaos and could not survive.' *Brown* v. *Commonwealth*, Ky., 551 S. W. 2d 557, 559 (1971).[18]

Stahl states that "Section 115 of the Constitution provides a right of appeal within the rules of court promulgated for that purpose. It does not guarantee a right of appeal in disregard of the rules."

Thus, Kentucky has chosen to place terms, conditions and circumstances upon its appellate system as approved and guaranteed by *McKane* v. *Durston*.

[17] In addition to Kentucky's system of limited and conditional appeal, post-conviction relief is available under RCr 11.42 and KRS 419.020, for example.

[18] Since due process emphasizes fairness between the state and the individual dealing with the state, for Kentucky to have dealt unfairly with respondent it would have to be found that it was unfair for Kentucky to enforce its own rules of dismissal. Enforcement of the rules has definite value and is based upon a rational policy of preventing chaos on appeal, of enhancing orderly proceedings and in helping to provide equal protection of law to all citizens, *Foremost Ins. Co.* v. *Shepard*, Ky., 588 S.W. 2d 468 (1979); *Williams* v. *Payne*, Ky., 515 S. W. 2d 618, 619 (1974). The information required in former RAP 1.030 assembles from throughout the record into one document all the parties to the appeal, a quick determination as to whether the appeal is timely and thus jurisdictional, whether it is sufficiently important for accelerated handling, its relationship to other pending appeals and questions, appellant's incarceration or at-large status, and other matters. By assembling it thusly, the court's time is conserved and the *Foremost-Williams* goals for litigants, courts and society are furthered. This is a fair and rational goal. Enforcement of the rules will insure that widespread disobedience to the rules will not occur and will not undermine and delay and burden the appellate system to the detriment of those who do obey the rules.

Kentucky law is non-reviewable by United States courts, *Buchalter, Snyder, Spencer, supra.* The court below misconstrued and misapplied the law of the Constitution of Kentucky in finding that appeal in Kentucky is absolute, without terms or conditions. Kentucky constitutional law has not been followed by the court below any more than has United States constitutional law.

Instead of citing authority of the Supreme Court of Kentucky, which is Kentucky's highest court, the Sixth Circuit elected to cite instead an opinion of the intermediate Court of Appeals of Kentucky, *Blankenship* v. *Commonwealth*, Ky. App., 554 S. W. 2d 808 (1977). The Supreme Court authority presented by petitioners is more recent. But more importantly, *Blankenship* was decided without reference to §116, Constitution of Kentucky, and therefore did not reach the holdings of *Foremost* and *Stokl* that §115 is conditioned upon strict adherence to the appellate rules mandated by §116. Moreover, *Blankenship* specifically referred to Fourteenth Amendment equal protection in reaching decision. And in further relying upon *Hammerskoy* v. *Commonwealth*, Ky., 398 S. W. 2d 883 (1966), the *Blankenship* court further showed that its decision rested upon Fourteenth Amendment equal protection. *Hammerskoy* itself, with apparent reservation, reached decision upon the basis of equal protection rights of indigents to counsel on appeal as articulated in *Douglas* v. *California, supra*, and in *Lane* v. *Brown*, 372 U. S. 477 (1963).

Previously, the Sixth Circuit in *Cleaver* v. *Bordenkircher*, 634 F. 2d 1010, at 1011, n. 1 (6th Cir. 1980) also mistakenly thought Kentucky's conditional grant of appeal grew out of Ky. Cons. §110(2)(b) without reference to §§115-116. Section 116, of course, provides the rules authority to the Kentucky court. Section 110(2)(b) provides only for appeals from convictions carrying penalties of 20 years or more. It does not provide for appeals of penalties of under 20 years. Interestingly, the Sixth Circuit had no apparent constitutional difficulty is providing for appeals of penalties of 20 years or more while not providing for appeals of penalties of under 20 years. In fact, §110(2)(b) merely is an aid in allocating appeals between the Supreme Court and Court of Appeals of Kentucky, and appeals are regularly taken and heard in Kentucky where the penalty is under 20 years, so long as the rules are followed, as *McKane* v. *Durston* approves.

In this context, neither §§115-116 provides for appellate counsel, and §11 Ky. Cons. provides for counsel for the accused only at trial — at the criminal prosecution — in much the same way as does the Sixth Amendment.

Thus, Kentucky in its own discretion and wisdom has placed terms, conditions and circumstances upon its appellate system as approved and guaranteed by *McKane* v. *Durston* and *Ross* v. *Moffitt* and the numerous other cited authority. Being Kentucky law and not constitutional law, it is not reviewable by a habeas corpus court of the United States.

Thus, whatever state courts do about dismissing state appeals does not offend the Constitution on due process grounds. The Constitution does not embrace such appeal in any due process fashion, and equal protection, by stipulation of the parties, does not exist here. Thus, no relief, constitutionally, can be granted in a United States habeas corpus court for the dismissal of a state appeal. Moreover, petitioners have shown the unfairness of saying it is constitutionally good for United States courts to dismiss appeals for not following rules but that it is constitutionally bad for state courts to dismiss appeals for not following rules.

CONCLUSION

For the foregoing reasons and authority, petitioners pray that the opinion of the United States Court of Appeals for the Sixth Circuit be reversed for constitutional error upon a holding by this Court:

1. That a conditional state appeal constitutionally may be dismissed upon failure of appellate counsel to follow rules of procedure, and

2. That counsel and effective assistance of counsel upon conditional state appeal constitutionally are not required by due process or the Sixth Amendment, and

3. That habeas corpus courts of the United States have no constitutional power to inquire into the neutral enforcement of neutral state rules of appellate procedure.

Respectfully submitted,

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PROOF OF SERVICE

I, *J. Gerald Henry*, *counsel of record for petitioners*, *hereby certify that three (3) copies of the foregoing Brief for Petitioners and three (3) copies of the Joint Appendix* were mailed by United States mail, with first class postage prepaid, to Mr. William M. Radigan, Walker & Radigan, Suite 300, Legal Arts Building, 200 South Seventh Street, Louisville, Kentucky 40202, *counsel for respondent*, and that all parties required to be served have been served, all on this *June 13*, 1984.

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APPENDIX

STATES WHICH HAVE PROVIDED FOR DISMISSAL OF CRIMINAL APPEALS FC'I FAILURE TO COMPLY WITH RULES OF APPELLATE PROCEDURE

1. *Alabama* — Alabama Rules of Appellate Procedure 1, 2(a)(2), 12.
2. *Arizona* — Arizona Rule of Criminal Procedure 31.15 (b).
3. *Arkansas* — Arkansas Rules of Criminal Procedure 36.22, 36.9.
4. *California* — California Rules of Court, 30, 30(c), 17(a).
5. *Colorado* — Colorado Rules of Criminal Procedure 38 to 40; Colorado Appellate Rules 1, 31(c), 39(a), (b), (c) and (e).
6. *Delaware* — Delaware Code Annotated 10 Sec. 147; Superior Court Criminal Rule 37; Delaware Supreme Court Rules 9(f), 29(b), 101(a).
7. *District of Columbia* — D.C. Code Section 11-743.
8. *Florida* — Florida Rules of Appellate Procedure 9.140 (a), 9.420.
9. *Georgia* — Georgia Code Annotated 6-809(c).
10. *Hawaii* — Hawaii Revised Statutes 641-11; Hawaii Rule of Criminal Procedure 39(b); Hawaii Supreme Court Rules 1(a)(1), 3(b), 6(b).
11. *Idaho* — Idaho Appellate Rules 11(c), 21, 32.
12. *Illinois* — Illinois S.H.A. Ch. 110A Sections 612 (Supreme Court Rule 612), 343 (Supreme Court Rule 343); Order of Illinois Supreme Court entered November 9, 1982 relating to Supreme Court Rule 343.
13. *Indiana* — Indiana Rules of Criminal Procedure 21; Indiana Rules of Appellate Procedure 8.1(A).
14. *Iowa* — Iowa Code Annotated 814.9; Iowa Rules of Appellate Procedure 102, 13(f), 18.

15. *Kansas* — Kansas Rules of the Supreme Court 1.01(e), 1.05.
16. *Kentucky* — Kentucky Rules of Civil Procedure 76.12 (9)(b), 76.36(6)(a).
17. *Maryland* — Maryland Rules of Procedure 812, 835, 1012, 1035.
18. *Massachusetts* — Mass. R. App. P. Rules 1, 19(c), 43 [illegible].
19. *Michigan* — Michigan General Court Rules 803.1, 806.1, 813.3, 817.3(2)(b), 853(2), 857.2(3), 857.3(3).
20. *Minnesota* — 49 MSA, R. Cr. P. Rules 29.01(2), 29.02 (11); 51 MSA RCAP 142.02.
21. *Mississippi* — Mississippi Code 99-35-101, 9-3-9, 9-3-39, 13-3-5, 13-3-13.
22. *Missouri* — Missouri Supreme Court Rules, Rules of Criminal Procedure 30.09(a), 30.09(b), 30.14.
23. *Montana* — Montana Code Annotated 46-20-318, 46-20-403(3).
24. *Nebraska* — Revised Statutes of Nebraska 29-2306.
25. *Nevada* — Nevada Revised Statutes 177.205(2); Nevada Rules of Appellate Procedure 11(c), 31(e).
26. *New Hampshire* — New Hampshire Superior Court Rule 105; New Hampshire Supreme Court Rules 4, 3(4), 13(7), 26(12).
27. *New Jersey* — New Jersey Court Rules 1969 R.2:3-2, R.2:9-6, R.2:5.
28. *New Mexico* — New Mexico Rules of Appellate Procedure for Criminal * * * Cases 107, 404.
29. *New York* — Rule of the New York Court of Appeals Section 500.7(a); Rules of the New York Supreme Court Sections 670.12(b), 670.12(c)(2), 670.18(b).
30. *North Carolina* — North Carolina Rules of Appellate Procedure 3, 4, 13(c), 14(d)(2), 25.
31. *North Dakota* — North Dakota Rules of Appellate Procedure 3, Committee Note to Rule 1, 3, 15.

32. *Ohio* — Ohio Appellate Rules 3, 3A, 4, 18(c), 11(c).
33. *Oklahoma* — Oklahoma Rules of the Court of Criminal Appeals Rule 3.12; Oklahoma Rules of Supreme Court Rule 1.
34. *Oregon* — Oregon Revised Statutes 138.185(2), 19.033, 19.033(3).
35. *Pennsylvania* — Pennsylvania Rules of Appellate Procedure Rule 902, and note following Rule 9[illegible].
36. *Rhode Island* — Supreme Court Rules of Appellate Procedure 4(b), 12(c), 16(c), 22(f).
37. *South Carolina* — Rules of the Supreme Court of South Carolina 23, 29.
38. *South Dakota* — South Dakota Statutes 23A-32-14, 15-26A-60.
39. *Tennessee* — Tennessee Rules of Appellate Procedure 1, 26(b), 29(c).
40. *Utah* — Utah Code Annotated 77-35-26, Utah Rule of Criminal Procedure 26(d)(1).
41. *Vermont* — Vermont Rules of Appellate Procedure 1 (Reporter's Notes), 31(c).
42. *West Virginia* — West Virginia Rules of Appellate Procedure 1, 3(b), 18(a), 25(a).
43. *Wisconsin* — Wisconsin Rules of Appellate Procedure 809.01, 809.30(i), 809.83(2).
44. *Wyoming* — Wyoming Rules of Appellate Procedure 1.01, 1.02, 5.11.

JOINT

APPENDIX

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No. 83-1378

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

PAUL KAVANAUGH, Superintendent, Blackburn Correctional Complex and DAVID L. ARMSTRONG, Attorney General, ... Petitioners,

versus

KEITH E. LUCEY, ... Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

JOINT APPENDIX

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Petition for Certiorari Filed February 17, 1984.
Certiorari Granted April 23, 1984.

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

3/29/77 Final judgment in Madison Circuit Court, imposing concurrent sentences on respondent Lucey of five years and a $5,000 fine for trafficking in LSD and ten years and a $10,000 fine for trafficking in cocaine.

9/12/77 Respondent Lucey serves brief on appeal in the Court of Appeals of Kentucky.

1/11/78 Court of Appeals of Kentucky enters order granting motion to dismiss appeal of respondent Lucey.

1/17/78 Respondent Lucey serves motion for reconsideration in Court of Appeals of Kentucky.

2/ 7/78 Court of Appeals of Kentucky enters order denying respondent Lucey's motion to reconsider dismissal of his appeal.

6/ 6/78 Supreme Court of Kentucky enters order denying respondent Lucey's motion to grant discretionary review of the decision of the Court of Appeals.

11/ 6/79 Judgment of United States District Court, Eastern District of Kentucky, at Lexington, grants writ of habeas corpus, unless Commonwealth of Kentucky reinstates respondent Lucey's direct appeal or initiates proceedings to retry him.

4/ 2/81 United States Court of Appeals for the Sixth Circuit, by opinion, remands action to District Court for further proceedings.

3/19/82 Respondent Lucey moves District Court to reissue the conditional writ of habeas corpus.

3/29/82	Petitioners Warden and Attorney General oppose reissuing the conditional writ of habeas corpus.
5/25/82	All parties stipulate in District Court that there is no equal protection issue in this action.
9/10/82	Judgment of United States District Court, Eastern District of Kentucky at Lexington, again grants writ of habeas corpus conditioned upon the Commonwealth of Kentucky reinstating Lucey's direct appeal or initiating proceedings to retry him.
9/10/82	District Court issues memorandum opinion stating reasons for reissuing the conditional writ of habeas corpus.
1/12/84	Opinion of United States Court of Appeals for Sixth Circuit affirms the judgment of District Court.

MADISON CIRCUIT COURT

Indictment No. 76-114

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

KEITH LUCEY - - - - - - - *Defendant*

FINAL JUDGMENT AND SENTENCE OF IMPRISONMENT—Entered March 29, 1977

Charge(s):

Count I — Unlawful Traffic In Schedule I Controlled Substance

Count II — Unlawful Traffic In Schedule II Controlled Substance

The defendant having entered a plea of not guilty and on the 21st day of March, 1977, a jury having returned verdicts that the defendant was guilty of the crime of Count I—Unlawful Traffic In Schedule I Controlled Substance (LSD) and Count II—Unlawful Traffic In Schedule II Controlled Substance (Cocaine) and having fixed his sentences at five (5) years and a fine of $5,000.00 on Count I and ten (10) years and a fine of $10,000.00 on Count II and the Court having withheld imposition of sentence pending receipt and study of a written pre-sentence report,

On this 28th day of March, 1977, the defendant, Keith Lucey, appeared in open court with his attorney, Hon. William M. Nixon and the Court inquired of the defendant and his counsel whether they had any legal cause why judgment should not be pronounced against him, and afforded the defendant and his counsel an opportunity to make statements in the defendant's behalf and to present any infor-

mation in mitigation of punishment, and the Court having given due consideration to the written report of the pre-sentence investigation prepared by the Division of Probation and Parole, and to the nature and circumstances of the crime, and the history, character and condition of the defendant, and the Court having advised the defendant and his counsel of the factual contents and conclusions of said written pre-sentence report and afforded defendant an opportunity and a reasonable time in which said matters could be controverted if he desired, and no such opportunity having been sought, and there being no legal cause to the contrary,

And the Court is of the opinion, after due consideration, that a sentence of probation or a sentence of conditional discharge should not be granted and that imprisonment of the defendant is necessary for the protection of the public because:

(a) That the defendant is in need of correctional treatment that can be provided most effectively by his confinement to a correctional institution; and

(b) That the granting of probation or conditional discharge of the defendant would unduly depreciate the seriousness of the defendant's crime; and

(c) There is a substantial risk that during a period of probation or conditional discharge the defendant will commit another crime.

Now, therefore, it is ORDERED and ADJUDGED that the defendant, standing convicted of the crimes of Count I—Unlawful Traffic In Schedule I Controlled Substance (LSD) Count II—Unlawful Traffic In Schedule II Controlled Substance (Cocaine) be confined in the state penitentiary for an indeterminate term, not to exceed five (5) years on Count I and ten (10) years on Count II and it is further

Ordered that the defendant be fined $5,000.00 on Count I and $10,000.00 on Count II and this sentence of five (5) years on Count I and ten (10) years on Count II shall run concurrent.

It is further ORDERED and ADJUDGED that the Sheriff of Madison County shall forthwith deliver the defendant to the custody of the Department of Corrections at such location within this state as said Department may designate.

It is further ORDERED and ADJUDGED that the defendant be and he hereby is credited with the time spent in custody prior to the commencement of this sentence, of 75 days toward service of the maximum term of imprisonment.

After imposing sentence, the Court informed the defendant that he had a right to appeal to the Court of Appeals of Kentucky with the assistance of counsel, that if he were financially unable to afford an appeal, a record would be prepared for him at public expense and counsel would be appointed to represent him, that an appeal must be taken within ten (10) days of the date of this judgment and that the clerk of the court would prepare and file a notice of appeal in his behalf within that time if he so requests.

Pending appeal bail is set at $30,000.00.

(s) James S. Chenault
Judge

Seen and Notice of
Entry Waived By:

(s) William M. Nixon
Attorney for Defendant

(s) Not Legible
Attorney for Commonwealth

COURT OF APPEALS OF KENTUCKY

File No. CA-1587-I

KEITH EUGENE LUCKY - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Madison Circuit Court
Hon. James S. Chenault, Judge

BRIEF FOR APPELLANT

William M. Nixon
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(Certificate omitted)

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COURT OF APPEALS OF KENTUCKY

File No. CA-1587-I

KEITH EUGENE LUCEY - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Madison Circuit Court
Hon. James S. Chenault, Judge

May it please the Court:

STATEMENT OF QUESTIONS PRESENTED

I.

Was It Error to Admit Photographs of the Appellant Into Evidence Which Lacked Any Probative Value and Served Only to Mislead and to Arouse the Passion and Prejudice of the Jury?

II.

Did the Charge to the Jury Meet the Requirements of the Due Process of Law?

III.

Was the Appellant Denied His Constitutional Right to a Fair Trial by Improper Conduct During the Trial and by Prejudicial Comments Made by the Prosecutor During His Summation?

STATEMENT OF THE CASE

On December 1, 1976, the appellant was arrested in Richmond, Kentucky and charged with trafficking in controlled substances. (T.E., p. 102). The appellant was indicted by the Madison County Grand Jury on December 16, 1976. The indictment formally accused the appellant of trafficking in Schedule I and II subtances in violation of KRS 218.990. (T.R., p. 1).

A jury found the appellant guilty on both counts on Mareh 21, 1976 and sentenced him to five and ten years imprisonment in addition to levying fines against him in the amount of fifteen thousand dollars. (T.R., p. 40). The appellant filed a motion for a new trial on March 24, 1976, and later amended that motion. (T.R., pp. 47, 52). The Trial Court overruled these motions on April 22, 1977. (T.R., p. 57). The appellant filed his notice of appeal on April 28, 1977. (T.R., p. 59).

STATEMENT OF THE FACTS

John Barton testified he was employed by the State of Kentucky as a narcotics agent. (T.E., p. 8). On November 3, 1976, he went to the appellant's residence with Ronald Irving and purchased controlled substances from him. Officer Barton stated he had purchased 36 tablets of lyserie acid diethylamide and one half gram of cocaine. (T.E., p. 9). He further stated he had spoked to the appellant on previous occasions in attempts to purchase illegal drugs, but had been unsuccessful. (T.E., p. 20).

Chemist Wilton E. Dingus testified that he was employed by the Kentucky State Police Crime Laboratory. He stated he had been given the substances by Officer Barton and after he had analyzed them, concluded that they were cocaine and lysergic acid diethylamide. (T.E., pp. 59-61).

The appellant testified that he first meet Mr. Ronald Irving at a party sometime in July of 1976 and that he asked the appellant if he knew where drugs could be obtained. (T.E., 91, 92). The appellant responded that he did not use drugs and did not know where any could be obtained. Ronald Irving stated that he was a paid informant for the Kentucky State Police and had recently been released from a drug rehabilitation center in Ohio. (T.E., pp. 43, 46, 56).

The appellant stated that Mr. Irving called him on nearly "a weekly basis" in an attempt to have him purchase narcotics for him. (T.E., pp. 92-3). Witness Irving admitted he had called the appellant "several times" in an effort to have him purchase drugs. (T.E., 48, 54, 55).

In October of 1976, Officer Barton and Ronald Irving appeared at the appellant's resident on High Street and suggested to the appellant that they go to Lexington and drink beer and have dinner. (T.E., p. 94). On the way, they met Edward Kremer who agreed to go along with the group. (T.E., p. 85). They went in an automobile owned by Ronald Irving. (T.E., 87-8, 94). According to the appellant, they went to the Columbia Steak House in Lexington and Officer Barton bought beer and steak dinners for everyone. (T.E., 95). Later in the evening, Officer Barton begain to talk about drugs and indicated that he wanted to obtain some. He then gave the appellant seventy-five dollars and insisted he try to purchase drugs for him with the money. (T.E., p. 96). They went to a party after dinner, but there were no drugs there. (T.E., p. 97, 88).

The appellant said that about a week later, Mr. Irving called him on the telephone and suggested that since he kept the money, he should produce the drugs they wanted. (T.E., p. 97). Officer Barton met the appellant in the parking lot of a local supermarket shortly thereafter and made a similar request (T.E., p. 97).

The appellant then recounted that not long after he had spoken to Officer Barton, two individuals came to his residence. He had never seen the two before. They explained that they were looking for a friend of theirs and were lost. After a short discussion, one of the individuals offered to sell the appellant 36 tablets of a substance he said was an amphetamine. (T.E., p. 98-99).

In an effort to satisfy the demands of Officer Barton and Ronald Irving, the appellant said he purchased the drugs, using the money which Officer Barton had given him earlier. (T.E., p. 98-99).

The very next morning, Mr. Irving called the appellant and asked if he had purchased the drugs for them yet. (T.E., p. 100). The appellant then stated that he told Mr. Irving that he had obtained narcotics for them. On November 3, 1976, the appellant gave the 36 tablets to Detective Barton in his residence. At that time he requested Barton and Irving not to bother him any longer concerning drugs. The appellant further stated that had it not been for the money provided by Officer Barton, and the suggestions and constant inquiries by Mr. Irving, he would never have purchased the controlled substance. (T.E., pp. 99, 102, 103).

IT WAS ERROR TO ADMIT PHOTOGRAPHS OF THE APPELLANT INTO EVIDENCE WHICH LACKED ANY PROBATIVE VALUE AND SERVED ONLY TO MISLEAD AND TO AROUSE THE PASSION AND PREJUDICE OF THE JURY.

The prosecution introduced certain photographs of the appellant which were apparently taken shortly after his arrest. (Exhibits C-1-A and C-1-B). The photographs depicted a confused, befuddled, and disoriented young man. His long hair appeared to be generally unkept. The appellant was dressed in ragged unconventional attire. It was abundantly obvious that the photographs had been taken

by the police as they were classic "mug shot" poses. One photo was of a full facial pose, while the other was of his profile. The overall effect of the exhibits was to present an extremely uncomplimentary image of the appellant.

Upon notice that the prosecution intended to introduce the exhibits, the following exchange took place:

> Mr. Nixon: Your Honor, counsel is attempting to introduce photographs of Mr. Lacey, and I can see no reason for introducing these other than to arouse the passion and prejudice of the jury with respect to the length of his hair and his disreputable appearance at the time of arrest. I think they are highly objectionable and I move that they not be introduced at this time, that they not be admitted at this time.
>
> The Court: What about that Mr. Walker?
>
> Mr. Walker: We want to show the appearance of the defendant at the time.
>
> . . .
>
> The Court: I think unless the defendant will admit that he was present at the time they have a right to show it in any event. There is a case that says that. Let the objection be overruled. (T.E., p. 12).

Later, the counsel for the appellant made the following statement to the Court:

> Mr. Nixon: Your Honor, the defendant is going to admit that he was present at the time. The defendant will later show that his sole defense will be entrapment in this case, and for that reason I think that the pictures should not be admitted.
>
> The Court: I think that the pictures go to how the defendant was at the time as to how he appeared to this man, and he has identified him, and, even though

> you say he was there, they have a right to show how he appeared at that time. I don't see that they are that prejudicial, although his hair is long. Overruled. (T.E., p. 15).

Since the Court was explicitly informed that the singular defense which the appellant would assert would be entrapment and as a predicate thereto was willing to acknowledge that he was present at the nefarious transaction, there appears to be no warrantable reason to allow the photographs into evidence. Because the exhibits cloaked and obscured the essential issue in the case and served to exacerbate hostile sentiment toward the appellant, it was unjust to permit the viremen to examine them. It has been stated that:

> Evidence which has no tendency or only a slight tendency to establish guilt or innocence or an accused, or which if effective at all could serve only to prejudice, mislead or excite the passions of a jury, should not be admitted. 22a *C.J.S.*, Criminal Law, Sec. 600, p. 395.

This Court has held on numerous occasions that evidence which is irrelevant should not be accepted in a criminal proceeding, particularly when there is a hazard of engendering the prejudices of the jury against the defendant. *Brown* v. *Commonwealth*, Ky., 275 S. W. 2d 928 (1955), *Acres* v. *Commonwealth*, Ky., 259 S. W. 2d 38 (1924). This rule of evidence should be much more stringently applied in criminal cases than in civil matters because the stakes are excruciatingly high in the former. Not mere chattels, but rather a citizen's liberty—the very substance of existence—is in controversy. Material goods may be easily replaced, but no amount of money from the exchequer can ever sufficiently compensate an individual for time which has expired while serving a sentence imposed upon him as a result of an unfair trial. The trial court must be com-

pelled to examine the evidence meticulously and to exclude that which is not relevant or material. The rationale for so doing is perhaps best stated in *Browning* v. *State*, Ala., 13 So. 2d 54 (1943), where the Court said that:

> The rule which requires that all evidence which is introduced shall be relevant to the guilt or innocence of the accused is always applied with considerable strictness in criminal proceedings. The wisdom and justice of this, at least from the defendant's standpoint, are self evident. The defendant can with fairness be expected to come to court prepared to meet the accusations contained in the indictment only . . . and all the evidence offered by the state, upon the trial of said charge or accusation, should consist wholly of facts which were within the range and scope of the allegations contained in the indictment upon which he is being charged. *Id.*, at 57.

Although certain unique evidentiary rules have evolved concerning photographs, with respect to materiality there should be absolutely no variance between pictures and other forms of evidence. This Court has stated that materiality is an essential predicate to the admission of a photograph in *Carson* v. *Commonwealth*, Ky., 382 S. W. 2d 85, 90 (1964) when the Court stated that a picture may be admissible ". . . if the picture serves to illustrate a material fact or condition." Moreover, because a photo has the inherent capability to instantly etch an indelible (and sometimes prejudicial) impression upon the mind of the view, perhaps it should be more closely scrutinized that other evidence. Nevertheless, it has been stated that:

> The requirement that evidence be relevant applies to documents and photographs with the same force as any other evidence. 1 *Whartons Criminal Evidence* Sec. 158.

Since the photographs of the appellant were devoid of any probative value, but were laden with a malignant potential for prejudice, it is logical that by an application of the above mentioned rules, they should have been excluded.

It is undisputable that the photographs were prejudicial to the appellant. It must be recalled by this Court that the trial took place in Madison County, a predominantly agrarian, essentially conservative, closely-knit community. Many of the good citizens of this community apparently harbored an irrational fear that the use of illicit drugs would become widespread and create serious social problems. It is not difficult to comprehend that parents were particularly fearful that such drugs would become readily available to their children. While these fears and concerns were not without some foundation, they were as warm coals which were capable of bursting into a flamming inferno when violently fanned.

The prosecutor was not only aware of the susceptibilities, but was also cognizant that many of the jurors had conjured a stereotype of someone from the drug milieu as one having long hair, unconventional attire, and a generally shabby appearance. The introduction of the photographs of the appellant in such a condition was nothing more than a deliberate machination, coldly calculated, to pray upon the fears and prejudices of the jury to the great harm of the appellant.

In a remarkably similar case to the matter at bar, the Alabama Court held that the introduction of such photographs constituted reversible error. The Court held that:

> In the instant case there was no question concerning the identity of the appellant; thus there could be no probative value whatsoever in the introduction of the photograph. It cannot be denied that a substantial segment of the public connects "long hair" and "hip-

pies" with the "drug scene". Because of this and due to the nature of the evidence presented in this case, the introduction of the photo could not have any effect other than to prejudice the minds of the jury against the defendant. *Van Nostrand* v. *State*, Ala., 286 So. 2d 903, 905 (1973).

In another case of almost identical circumstances, the Iowa Court held that a photograph should have been excluded for an equivalent reason. In *State* v. *Ostrand*, Iowa, 219 N. W. 2d 509 (1974), the Court said the following:

> The photograph would normally be relevant on identification of the defendant. But at the time the Court admitted the photograph, defendant had testified that he sold the marijuana to Arduser as charged by the State. Hence the photograph was no longer necessary . . . should the case develop in the same way on retrial, we think the photograph should not be received in evidence. If defendant admits he sold marijuana as charged, the only purpose we can see for thereafter introducing the picture would be display to the jury defendant's long hair and beard at the prior time, but defendant is not on trial for that. *Id.*, at 513.

The appellant is well aware of the decision of *Urbanski* v. *Commonwealth*, Ky., 526 S. W. 2d 7 (1975). In that case, the Court held that in a prosecution for the sale of a controlled substance, it was not error to allow into evidence a photograph which was used only to show how the defendant appeared at the time of his arrest and not for identification. Urbanski, as did the appellant herein, manifested an unconventional appearance in the photograph. In both cases, the defendants were well groomed at their trials.

At first blush, it would appear that since *Urbanski* presents essentially the same issue, its precedent should be

followed. However, it is imperative to note that in *Urbanski* the trial judge delivered a strong admonition to the effect that the defendant was on trial for the possible sale of illegal drugs and not for his appearance. Despite the fact that the appellant contends that an admonition would not have entirely cured the injury inflicted by the photographs, there can be no doubt that it would have reduced their prejudicial impact significantly.

Without such an admonition, it is possible that the jury may have placed an unwarranted amount of weight upon the exhibits to the appellant's great detriment. Since *Urbanski* took prominent notice of the trial judge's admonition, it is therefore submitted that it was error for the Court not to grant a similar admonition in this instance.

The *Urbanski* decision notwithstanding, the appellant further submits that the admission of the exhibits substantially violated the right to be free from self-incrimination as protected by the United States and Kentucky Constitutions.

There can be little doubt that the photographs were a significant factor in the conviction of the appellant. The evidence which was presented to the jury could have supported verdicts of acquittal or conviction equally well. The testimony agreed upon the major facts of the case, with the exception of the extent to which the police or their agent induced the appellant to sell the controlled substance.

One can readily visualize the members of the jury as they began their deliberations. Before them were the photographs which had been ceremoniously carried into the juryroom. As they discussed the testimony of the witnesses and pondered the evidence according to the instructions given to them by the Court, must not their eyes have fallen upon the invidious exhibits spread across the conference table? As the time passed, gradually the image of the neatly attired young man in the courtroom must have

surely faded until all that the jury could see was the squalid reprobate depicted in the photographs. With the stereotype of a person from the drug milieu in their minds and the words of the prosecutor's summation ringing in their ears, it is difficult to argue that the photographs did not damage the appellant. It is painfully obvious that the exhibits served only to incriminate the appellant unjustly.

Additionally, it is clear that the photographs were police type "mug shots". Although Officer Barton indicated that the pictures represented the appearance of the appellant at the time of his arrest, he did not conclusively state that both photographs were taken then. (T.E., p. 13). Therefore, the possibility remains that some members of the jury may have been led to believe that the appellant had a criminal record. It is submitted if such was the case, reversal is required. *Roberts* v. *Commonwealth*, Ky., 350 S. W. 2d 626 (1961), *State* v. *Breedlove*, Ohio, 271 N. E. 2d 239 (1971), *People* v. *Murdock*, Ill., 237 N. E. 2d 442 (1968).

The "mug shot" format of the exhibits was also highly objectionable because such a manner of depicting the appellant served to convey the image of a hardened criminal to the jury. Individuals do not usually take pictures of their friends or relatives in such poses. The only place where most people ever see such photographs is in the wanted posters at the local post office. To connect the appellant with these fugitives is a diabolically ingenious psychological device which must not be tolerated.

In *People* v. *Heiss*, Mich., 186 N. W. 2d 63 (1971), the Court disapproved of the use of such photographs. The Court stated that:

> One final feature of the record strikes us: the unnecessary admission of an irrelevant and prejudicial "mug shot" of defendant. Short of use for identification which was not the case here, no purpose was served in admitting the photograph showing the defendant with a beard which he did not have at trial time and vestiges of the police department photographic techniques. *Id.*, at 66.

The presumption of innocence is, without question, one of the essential doctrines of our system of justice. It is one of the things which sets our nation apart from the many repressive dictatorships which display little regard for human dignity and the rights of the individual. To allow the photographs into evidence under these circumstances would be to significantly erode this most cherished foundation of our jurisprudence.

It has recently been held that to allow a defendant to stand trial in prison garb denies him the protection of this presumption and constitutes reversible error. See *Estelle* v. *Williams*, 425 U. S. 501, 48 L. Ed. 2d 126, 96 S. Ct. 1691 (1976), *Scriver* v. *Commonwealth*, Ky., 539 S. W. 2d 291 (1976).

If the wearing of jail garb at trial is repugnant to the presumption of innocence, it is logical to conclude that it would be equally repugnant to admit a photograph of a defendant taken of him while he was in jail. What difference is there between the picture of a defendant in jail and a picture of a defendant at a police station? Both are involuntarily in custody; both are not provided with an opportunity to improve their appearance; and both are photographed in hostile surrounding. It is submitted to this Court that there is no real distinction between these situations and that *Scriver* compells reversal.

Furthermore, there is authority which indicates that a court is under an affirmative duty to furnish suitable courtroom attire to an indigent defendant. See *Bentley* v. *Crist*, 469 F. 2d 854 (9th Cir. 1972). Suitable courtroom attire means more than merely a lack of jail clothing. When everyone in the courtroom is dressed in coats and ties, it is reasonable to expect that the defendant should be similarly

attired. It appears obvious that in addition to the proper clothing, the rudiments of personal grooming should be provided. This should include razor, comb, toothbrush, and an opportunity to secure a proper tonsure.

It would be the zenith of absurdity to make such provisions for the defendant in an effort to avoid prejudice and then to allow the prosecution to introduce a photograph of him for the *sole purpose of showing how he looked before the measures were taken.*

Finally, the appellant earnestly states that it should not be the concern of the trier of fact how the appellant appeared previously, where there is not a question of identification. Enshrined in most courthouses and many public buildings throughout the land stands a statute which proudly symbolizes the essence of the administration of justice under Common Law. The Goddess of Justice firmly grasps a sword in her right hand, while her left upraised hand holds the scales. Litigants who come before her seeking justice know that their causes will be adjudged equitably only by the weight of the evidence on the scales. That the goddess is blind is no mistake. Her blindness symbolizes that matters will be decided solely upon the evidence. She sees not that the litigants are black or white, rich or poor, powerful or powerless; and most certainly, she does not see the length of a litigant's hair or his mode of dress.

Justitia caucca est. All that the appellant seeks is that this Court restore his Common Law right to have his cause adjudged by justice that is blind.

THE TRIAL COURT'S CHARGE TO THE JURY FAILED TO MEET THE REQUIREMENTS OF THE DUE PROCESS OF LAW.

The appellant contends that he was severely prejudiced by the jury instructions issued by the Trial Court. It is

submitted that they were defective in the following three areas: (1) the statement of reasonable doubt, (2) a failure to instruct on the presumption of innocence, and (3) a failure to specifically instruct on the entire law of entrapment.

(1) Perhaps there is nothing which influences the outcome of a trial more than the instructions delivered by the Court to the trier of fact. Because of this, the instructions must be accurate, precise and understandable by the lay person. There is no question that the instructions must be absolutely impartial.

This is especially true when the Court discusses the concept of reasonable doubt because of its preeminent position in the criminal process. In the case of *In Re Winship*, 397 U. S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970), the United States Supreme Court said that:

> The use of the reasonable doubt standard is indispensible to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law must not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in a free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact-finder of his guilt with utmost certainty. *Id.*, at 364.

The concept has long held constitutional stature. In dissent, Mr. Justice Frankfurter stated in *Leland* v. *Oregon*, 343 U. S. 790, 96 L. Ed. 2d 1302, [illegible] Ct. 1002 (1952), that:

> It is the duty of the government to establish his guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of the boasts of free society—is a

requirement and a safeguard of due process of law in the historical procedural content of "due process." *Id.*, at 802, 803.

With an apparent disregard for this strict standard of proof, the Court delivered the following charge:

> The term "reasonable doubt" as used in these instructions means a substantial doubt, a real doubt, in that you must ask yourself not whether a better case might have been proved, but whether after hearing all of the evidence you actually doubt that he is guilty. (T.E., p. 128).

This instruction is objectionable on its face because it is drafted in terms which are more compatible with conviction than with acquittal. It must be kept in mind by this Court that the cititzens on the jury were not trained in the law; and therefore it is reasonable to expect them to take the words of the Court literally. The appellant takes particular exception to the use of the word "actually" in the instruction. A reasonable interpretation of this instruction would suggest that for the jury to find the Appellant not guilty they would have to "actually doubt", "really doubt", or "certainly doubt" that he is guilty. Clearly, this is not the reasonable doubt standard. To slant the instructions in such a fashion is to do violence to the ideal of the presumption of innocence and thereby deny the appellant the due process of law.

It appears that the convincing argument of Kentucky Bar Association President Honorable Frank E. Haddad in *Evans* v. *Commonwealth*, Ky., 474 S. W. 2d 370 (1971) has significance to the matter at bar. In discussing an almost identical instruction he stated:

> To require the jury to find a reasonable doubt of Appellant's guilt before it could acquit him was to vitiate

> the presumption of innocence and to create a presumption of guilt. Under the instruction, Appellant was presumed guilty unless the jury had a reasonable doubt of his guilt . . . Instead of thinking "I must *acquit* the defendant unless I believe beyond a moral certainty that he is guilty," jurors under this instruction think to themselves, "I must *convict* the defendant unless I have a reasonable doubt as to his guilt. *Id.*, at 373.

In *Schmidt* v. *Commonwealth*, Ky., 508 S. W. 2d 768, 770 (1974), the Court stated that "What is important is to convey to the jury the idea that where they entertain reasonable doubt, they should acquit."

It is submitted to this Court that the instructions given in the appellant's case did not accurately convey this idea and therefore the conviction should be set aside. The term "reasonable doubt" should be defined in terms of the negative rather than the positive to meet the requirements of *Schmidt*.

In *United States* v. *Emalfarb*, 484 F. 2d 787 (7th Cir. 1973), the Court sharply disapproved of an instruction which encompassed the same approach as did the instruction in the appellant's case. The Court said that the instructions should be stated in the negative rather than the positive. The Court further remarked that:

> Reasonable doubt should be defined in terms of doubt that would make a person hesitate to act, rather than defining the phrase "beyond a reasonable doubt" in terms of evidence of such persuasion that jurors would be willing to rely upon it in their most important affairs in their own lives. *Id.* at 787.

Similar instructions which were phrased in the same manner were found abhorrent to the Court in *United States*

v. *Hart*, 407 F. 2d 1087 (2d Cir. 1969), in which the Court stated:

> . . . it should be emphasized that the "hesitate to act" language in our opinion more effectively conveys to the jury the meaning of reasonable doubt than most other formulations. *Id.*, at 1091.

In *Holland* v. *United States*, 348 U. S. 121, 99 L. Ed. 150, 75 S. Ct. 127 (1954) the Supreme Court disapproved of an affirmative instruction and said:

> We think this section of the charge should have been in terms of the kind of doubt that would make a person hesitate to act . . . rather than the kind on which he would be willing to act. *Id.*, at 348 U. S. 140.

It is submitted that when the reasoning of these cases is applied to the instant instructions, a reversal is required.

(2) It is outrageous to think that not only did the Trial Court issue a reasonable doubt instruction which was more compatible with guilt than with acquittal, but that the Court also refused to issue an instruction of the presumption of innocence.

The appellant tendered the following instructions to the Court:

> I. The law presumes a defendant to be innocent of crime. Thus a defendant, although accused, begins the trial with a clean slate—with no evidence against him. And the law permits nothing but lawful evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are convinced beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

> IV. A reasonable doubt exists whenever, after careful and impartial consideration of all of the evidence in the case, the jurors do not feel convinced to a moral certainty that the defendant is guilty of the charge. So if the jury views the evidence in the case as reasonably permitting either two conclusions—one of innocence, the other guilt—the jury must adopt the conclusion of innocence.
>
> The jury will remember that the defendant is never to be convicted on mere suspicion or conjecture. (T.E., pp. 124, 125).

The presumption of innocence is historically of the highest significance in our system of jurisprudence. In *Coffin* v. *United States*, 156 U. S. 432, 39 L. Ed. 481, 15 S. Ct. 394 (1895) the Supreme Court said:

> The principle that there is a presumption of innocence in favor of the accused is the unbounted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law. *Id.*, at 15 S. Ct. 403.

The tendered instructions were firmly founded upon substantial case law in this jurisdiction and it is therefore difficult for the appellant to understand why they were refused. For example in *Hollin* v. *Commonwealth*, Ky., 307 S. W. 910 (1957), the Court proclaimed:

> We must presume the appellants innocent until their guilt is established beyond a reasonable doubt. The presumption of innocence must be overcome; not by mere possibilities, conjectures, or suspicious circumstances, but by satisfactory evidence. *Id.*, at 911.

Earlier, in *Salyer* v. *Commonwealth*, Ky., 94 S. W. 2d 281, 282 (1936) the Court stated:

> Presumption of innocence attaches to one arraigned for crime until it has been legally determined otherwise, and this presumption can only be overcome by evidence of a substantial and probative character.

Koch v. *Commonwealth*, Ky., 390 S. W. 2d 783 (1965) the Court supported the appellant's tendered instruction when it stated:

> Where the facts of a given case themselves afford opposing presumptions if equal weight —of depravity of mind or innocence of purpose—the scale should predominate on the side of innocence. *Id.* at 786.

Perhaps, one of the most complete statements on this issue may be found in *Wharton's Criminal Evidence*. That learned treatise clearly states that upon request of the defendant, it is reversible error to refuse an instruction on the presumption of innocence. It further comments that:

> The presumption of innocence and proof of guilt must always be kept separate and distinct. The presumption of innocence is a conclusion of law in favor of the accused which continues until a sufficient measure of proof of guilt overcomes it. For clarity, then the defendant is entitled to instructions upon two separate points: (1) the presumption of innocence and (2) what constitutes a reasonable doubt. *Id.*, at sec. 96.

The treatise also said:

> The defendant is entitled to an instruction on the presumption of innocence, although failure to so instruct the jury is not reversible error in the absence of a request by the defendant for such instruction. *Id.*

It is incomprehensible that an instruction on the presumption of innocence was denied the appellant. An

egregious wrong has been done in this case which demands reversal by this Honorable Court.

(3) The appellant next asserts that the Trial Court failed to adequately instruct the jury on the entire law of entrapment. This Court has stated in *Buell* v. *Commonwealth*, Ky., 7 S. W. 2d 237 (1928), that "The jury instructions, whether good or bad, are to the jury, the whole law of the case." Therefore, it was essential to the appellant that his sole defense be given a detailed and full explanation. The Trial Court presented the following instruction on entrapment to the jury:

> Instruction Number 7. (Entrapment) The defendant is entitled to the defense of entrapment if (a) John Barton and Ronald Irving, or either of them, induced him to commit the acts mentioned in Instruction Number 2 and Instruction Number 3 (if he did commit it), (b) John Barton was then a police officer for the Commonwealth of Kentucky and was seeking thereby to obtain evidence against the defendant for the purpose of criminal prosecution, and (d) at the time of such inducement or encouragement the defendant was not otherwise disposed to engage in such conduct. (T.E. pp. 127-8).

In addition to the above instruction, the Court also added to each possible charge the phrase "That he was not induced to do so by entrapment."

It is submitted that these instructions failed to convey to the jury the total law of this defense. The defense of entrapment is not a defense which many lay people readily understand. To provide the appellant with due process, the Court should have fully explained the scope of the defense and given the rationale for the law. The instructions tendered by the appellant did this, and it is asserted that

error was committed in denying the appellant the benefit of them. See T.E., pp. 126-9.

It seems clear that the prosecution has the burden of proof in establishing beyond a reasonable doubt that the appellant was not entrapped. Professor Brickey, in her learned treatise states:

> Designation of entrapment as a defense imposes the burden of disproving the existence of the defense beyond a reasonable doubt upon the prosecution, once the evidence tending to support the existence of the defense is of such probative force that the defendant would be entitled to a directed verdict of acquittal in the absence of contravening evidence. Brickey, *Kentucky Criminal Law*, sec. 6.01 (1974). Also see K.R.S. 500.070.

In *Garcia* v. *United States*, 373 F. 2d 806 (10th Cir. 1967), the Court set forth in some detail what an instruction on entrapment should encompass:

> But, after all that has been said on the subject, we think it is sufficient to a proper understanding of the defense of entrapment that if the state induces a person to do an unlawful act when he has no previous disposition to do so, it is not punishable, for in these circumstances, the state is *particeps criminis*, i.e., a partner in the crime. This is not to say, however, that the state is forbidden, even by ruse or strategem, to afford an able and willing seller of narcotics an opportunity to ply his trade. See *Robinson* v. *United States*, 10 Cir., 366 F. 2d 575. If there is evidence tending to show that government agents may well have induced the accused to commit the crime charged, he is entitled to an instruction in the language we have suggested, and the jury should also be told that the burden is upon the government to prove beyond a reasonable doubt that its agents did not entrap the accused as that term in defined and is to be appplied in the determination of guilt or innocence. *Id.*, at 809.

It is submitted that the Trial Court's instructions on this critical point of law were sparce and confusing to the average juror. Particularly, it is not at all clear from the charge that the prosecution has the burden of proving beyond a reasonable doubt that the appellant was not entrapped. Because of this grave deficiency in the instructions, the appellant earnestly states that he was denied the full consideration of his only defense and therefore demands that the judgment below be set aside and that he be granted a new trial.

THE APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY IMPROPER CONDUCT DURING THE TRIAL AND BY PREJUDICIAL COMMENTS MADE BY THE PROSECUTOR DURING HIS SUMMATION.

During the cross-examination of the appellant and another witness, the prosecutor asked several questions which were calculated to prejudice the appellant unfairly. By improper suggestions and insinuations the prosecution attempted to depict the appellant as a member of the drug milieu. That there is a tremendous danger for prejudice to the defendant in such questions is obvious in narcotics cases. It has been observed that:

> In today's society, possibly no act is more abhorred than the selling of narcotics. And nothing makes it more difficult for a defendant to receive a fair trial than for the jury to think that the defandant or his acquaintances are men of bad character. *United States* v. *Clemons*, 503 F. 2d 486 (8th Cir. 1974).

Upon the cross-examination of Witness Edward Kremer, the prosecution injected a highly charged phrase which was designed to suggest that the appellant was a drug user and that drug users frequented his residence. In reference to appellant's home, the prosecutor asked:

> X20 Well, would it be fair to say it somewhat, as a description, called a pad, a crash pad?
>
> Mr. Nixon. Objection to that. It's unwarranted, Your Honor.
>
> The Court: Overruled. (T.E., p. 83).

It is submitted that use of the phrase "crash pad" was a deliberate action by the prosecutor to introduce jargon of the "drug culture" into the trial to the detriment of the appellant.

During the cross-examination of the appellant, the prosecution once again employed the same tactics. The prosecution questioned the appellant extensively as to whether he owned an ambulance or not. The following exchange took place:

> X12 So you have been around? You have been around? You drove an ambulance; I think your vehicle, isn't that right, or it used to be?
>
> A No. I have a '66 Chevrolet.
>
> X13 You used to drive one of those big, long hearses, didn't you sir?
>
> A No. I didn't have a hearse.
>
> X14 You never had one? Never had an ambulance? Is that what you are telling the jury?
>
> Mr. Nixon: He's answered that question, Your Honor.
>
> X15 Is that what you are telling the jury?
>
> The Court: Overruled.

> X16 You have never had an ambulance?
>
> A I have never had an ambulance that—I have never owned an active ambulance, no.
>
> X17 Well, you had one as your private vehicle; you will admit that, won't you, Mr. Lucey?
>
> Mr. Nixon: Your Honor, I have to object to counsel's, uh, he's going on a fishing expedition, talking about whether his landlady is deaf or not, or whether Mr. Lucey drives an ambulance or not, I can't see where this has any bearing or relevance to the matter at bar.
>
> The Court: It's cross-examination as to his circumstances. Overruled. (T.E., pp. 106-7).

The injection of this irrelevant matter should not have been tolerated. Whether the appellant owned an ambulance previously or not had absolutely no probative value in determining if he had illegally sold controlled susbtances to an undercover police detective. However, the matter had a significant prejudicial impact upon the appellant's case. There are many individuals in society who associate vans, ambulances, and similar vehicles with the "drug culture." Therefore, it is submitted that the appellant's cause was unjustly harmed. See *Van Nostrand* v. *State*, Ala., 286 So. 2d 903 (1973).

During the prosecutor's summation, several references were made to the sale of narcotics to children. The prosecutor argued:

> If he is selling it to undercover narcotics agents, ladies and gentlemen, if he has the audacity to approach people in the parking lot of IGA, do you not think he would approach another citizen? *Would he not approach another, younger, more impressionable kid?* (emphasis added) (T.E., p. 148).

Later, he made another reference to children in his summation when he said:

> But I submit to you that you cannot treat this man as a reasonable man, because he is unreasonable. You cannot treat this man as *your child*, because it is you and *your children who suffer*. (emphasis added) (T.R., p. 151).

In response, the appellant made the following motion, which states, in part, that:

> In particular, the prosecutor sought, and apparently succeeded, to villify the defendant in the eyes of the jury when he made a pernicious comment concerning the specter of the dissemination of dangerous drugs to the children of the community. It is obvious that this iniquitous statement was coldly calculated to arouse, incite and inflame the passions and prejudices of the jury. The trial testimony is completely devoid of any evidence which would indicate that the defendant had ever sold controlled substances to anyone other than a police detective. (T.R., p. 57).

In the case of *Taylor* v. *State*, 308 So. 2d 714 (1975), the Alabama Court of Criminal Appeals reversed the defendant's conviction because of unsupported prosecutorial comments on the sale of drugs to children. The Court stated:

> Here, we are of the opinion that the statements by the prosecuting attorney, "Whose children were these drugs to be sold to? How much money was to be made by selling this illegal drug?" Were an imputation and accusation of other crimes which had no support in the record. Such statements are not only without evidentiary support in the record, but constitute an accusation that appellant is a man "who makes money from

> turning everyone else on." *Racine* v. *State*, 290 Ala. 225, 275 So. 2d 655. This appeal to passion and prejudice in light of its reference to the sensitive subject of children, and complete lack of support in the record for such comment is prejudicial error. *Id.*, at 716-717.

It is submitted that there is absolutely no support in the record of this case to justify the statements of the prosecutor about the sale of narcotics to children. Therefore, because of these and other unsupported vituperative remarks made by the prosecutor during his summation, the appellant asserts that his cause was unjustly prejudiced. This Court has stated that:

> We do not deem it necessary to further elaborate the question, except to state that trials in the court house should be as fair and impartial a manner as is humanly possible to attain, and courts should not hesitate to grant new trials, or to set aside the submission and order the case continued whenever any method of conduct is adopted which could have no other purpose than the obtention or an undue advantage, and which is not justified by anything found in the record. This course, if pursued, would no doubt have a salutary effect, finally resulting in a most healthy improvement in the conduct of trials in the courthouse. *Stearns Coal & Lumber Co.* v. *Williams*, Ky., 198 S. W. 54, 58 (1917).

The appellant implores this Honorable Court to continue the on the course it boldly charted many years ago and grant him a new trial.

CONCLUSION

For the reasons delineated above, the appellant respectfully requests this Court to reverse his conviction in the Madison Circuit Court.

Respectfully submitted,
Attorney for Appellant

(s) William M. Nixon
William M. Nixon
P. O. Box 688
Richmond, Kentucky 40475

COURT OF APPEALS OF KENTUCKY

No. CA-1567-MR

KEITH LUCEY . . . . . *Appellant*

v.

COMMONWEALTH OF KENTUCKY . . . *Appellee*

Appeal from Madison Circuit Court
No. 76-114

ORDER GRANTING MOTION TO DISMISS APPEAL

BEFORE: PARK, HOWARD, and HOGGE, JUDGES

The Court, having considered the motion to dismiss the appeal for failure to comply with RAP 1.095(a)(1), and having further considered the response thereto, and it appearing that the appellant has failed to supply the information required by RAP 1.095(a)(1), said motion is hereby GRANTED.

ENTERED: January 11, 1978

(s) James Park, Jr.
Judge, Court of Appeals

COURT OF APPEALS OF KENTUCKY

CA-1587-MR

KEITH E. LUCEY . . . . . *Appellant*

v.

COMMONWEALTH OF KENTUCKY . . . *Appellee*

MOTION FOR RECONSIDERATION

Comes now the appellant, Keith E. Lucey, by counsel, and pursuant to CR 76.38(2) moves that this Court reconsider its order of January 11, 1978 in which the appellant's appeal was dismissed.

In support of this motion, the appellant states that he has made a good faith effort to comply with the appellate rules as they existed at the time his appeal was taken. The Court ordered that the appeal should be dismissed because the appellant did not strictly comply with RAP 1.095(a)(1). The appellant respectfully states that although he did not file an instrument entitled "Statement of Appeal" he did diligently prepare and file a document entitled "Brief for Appellant" which contained all of the essential information required by RAP 1.095(a)(1).

RAP 1.095(a)(1) incorporates by reference RAP 1.090 and requires the following information:

(1) RAP 1.090(a) states that the parties shall be designated. The appellant states that this item is satisfied by the designation of the parties on the cover sheet of the Brief for Appellant.

(2) RAP 1.090(b) states that the name and address of counsel shall also be designated. The appellant submits that the names and addresses of counsel were set forth in the certificate of service on the cover sheet of the Brief for Appellant.

(3) RAP 1.090(c) states that the name and address of the trial judge shall be set forth. The appellant states that this information might also be found on the cover sheet of the Brief for Appellant. The address of this jurist may be found in the certificate of said instrument.

(4) RAP 1.090(d) states that the date of the order or judgment appealed from shall be designated. It is submitted that this information is contained in page two of the Brief for Appellant.

(5) RAP 1.090(e) states that the date the notice of appeal was filed and the page of the record should be designated. The appellant respectfully points out that this information was also contained on page two of the aforementioned brief.

(6) RAP 1.090(f) asks for information concerning cross appeals, supersedas bonds, reasons to advance and CR 54. It is submitted that none of these items required an affirmative answer and therefore were not mentioned in the aforementioned brief. There was no other case on appeal which involved similar questions and the appellant was not free on bond. This last item was referred to on page six of the Brief for Appellant.

Further, the appellant contends that this section of the rule was written so as to imply that only if any of the enumerated items were true should they be stated. Since none of these items were true, they were not listed. The appellant relied upon this interpretation of this section of RAP 1.090.

The appellant submits that the Brief for Appellant has substantially complied with the requirements of the Rules. It is noted that CR 8.06 requires that all pleading shall be construed to do substantial justice. The appellant earnestly implores the Court to apply the spirit of this rule to the matter at bar and to set aside the order previously entered.

The appellant has prepared and has attached hereto, a Statement of Appeal, which was drafted in conformity with CR 76.06, as this rule has apparently superseded RAP 1.095(1)(a).

Wherefore, in the interest of justice and fundamental fairness, this Honorable Court is requested to reconsider and to set aside its order of dismissal. The appellant further seeks the opportunity to be heard through counsel on this motion as this motion is critical to the outcome of this case.

Attorney for Appellant

(s) William M. Nixon
P. O. Box 698
Richmond, Kentucky 40475

(Certificate omitted)

COURT OF APPEALS OF KENTUCKY

No. CA-1567-MR

Keith Lucht . . . . . *Appellant*

v.

Commonwealth of Kentucky . . . *Appellee*

Appeal From Madison Circuit Court
No. 76-114

ORDER

1) Denying Motion for Oral Argument on Motion to Reconsider
2) Denying Motion to Reconsider
3) Denying Motion for Oral Argument on the Merits
4) Denying Motion to Proceed in Forma Pauperis

Before: Martin, Chief Judge, Reynolds, and Wilhoit, Judges

The Court, having considered the appellant's motion for oral argument on the motion to reconsider this Court's January 11, 1978 order dismissing this appeal, and being otherwise sufficiently advised, said motion is hereby Denied.

It is further Ordered that the motion to reconsider be, and hereby is Denied.

The motion to reconsider the dismissal of this appeal having been denied, the motions for oral argument on the merits of the appeal and for leave to proceed in forma pauperis are hereby Denied.

Entered: February 7, 1978

(s) Charles Reynolds
Judge, Court of Appeals

SUPREME COURT OF KENTUCKY

78-SC-78-D
(CA-1587-MR)

KEITH E. LUCEY . . . . . *Movant*

v.

COMMONWEALTH OF KENTUCKY . . . *Respondent*

Madison Circuit Court
78-134

ORDER DENYING DISCRETIONARY REVIEW

The motion of Keith E. Lucey for a review of the decision of the Court of Appeals is denied, and the decision stands affirmed.

ENTERED June 6, 1978.

(s) James S. Palmore
Chief Justice

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON

C. No. 78-134

KEITH E. LUCEY . . . . . *Petitioner*

v.

WILLIAM SEABOLD, Supt. . . . . *Respondent*

JUDGMENT

The Court having considered the Magistrate's Report and Recommendation herein, together with the exceptions filed thereto by the Respondent, and having heard the parties orally in regard to the issues presented herein and being sufficiently advised;

IT IS NOW THEREFORE ORDERED AND ADJUDGED HEREIN AS FOLLOWS:

(1) That the Magistrate's Report and Recommendation heretofore filed herein be and the same is hereby adopted, ratified and confirmed by the Court herein.

(2) The subject Petition for a Writ of Habeas Corpus is sustained, and it is directed that the Writ issue herein subject to the qualifications set out in numerical paragraph (3) hereof. *Beasley* v. *United States*, 491 F. 2d 687 (6th Cir. 1974); *Benoit* v. *Wingo*, 423 F. 2d 880 (6th Cir. 1970), cert. denied 400 U. S. 852; *Goodwin* v. *Cardwell*, 432 F. 2d 521 (6th Cir. 1970); *Boyd* v. *Cowan*, 519 F. 2d 182 (6th Cir. 1975).

(3) That execution of the subject Writ of Habeas Corpus is stayed for a period of one-hundred-twenty (120)

days during which the Commonwealth of Kentucky is given the opportunity to reinstate the petitioner's direct appeal or initiate proceedings to retry the petitioner.

(4) That the conduct of the petitioner's counsel, William M. Nixon, P. O. Box 688, Richmond, Kentucky 40475, herein in atacking his own work product by the prosecution of the instant Habeas Corpus proceeding based upon said petitioner's allegation of his own ineffectiveness as counsel for the petitioner in the state proceedings is hereby referred to the Board of Governors of the Kentucky State Bar Association for whatever action, if any, that body may deem appropriate.

(5) The Clerk of this Court shall forthwith forward to the Board of Governors of the Kentucky State Bar Association a duly authenticated copy of the Magistrate's Report and Recommendation herein and the Court's Judgment this date entered herein for such action, if any, as that body may deep appropriate.

This the 6th day of November, 1979.

(s) Bernard T. Moynahan, Jr.
Judge

No. 79-3752

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

KEITH E. LUCEY, - - - *Petitioner-Appellee,*

v.

WILLIAM SEABOLD, Superintendent, Blackburn Correctional Complex, - *Respondent-Appellant.*

Appeal From the United States District Court for the Eastern District of Kentucky

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Decided and Filed April 2, 1981

Before: EDWARDS, Chief Judge, ENGEL and JONES, Circuit Judges.

The Court delivered a PER CURIAM opinion. JONES, Circuit Judge (p. 3), delivered a separate dissenting opinion.

PER CURIAM. This is an appeal from the United States District Court for the Eastern District of Kentucky which entered a writ of habeas corpus on petition of appellee Lucey who claimed deprivation of his right to effective assistance of appellate counsel.

The facts in this case show that Lucey's retained counsel had perfected his appeal and had filed the necessary record and briefs but the Court of Appeals of Kentucky had dismissed his appeal because he had failed to follow the requirement of Kentucky Rule of Appellate Procedure 1.095 (a)(1) which includes the requirement that the pleadings in the Court of Appeals must contain "[t]he same informa-

tion as required in a statement of appeal in the Supreme Court pursuant to RAP 1.090."

There is no question of course, but that the Court of Appeals has a perfect right to demand that such a document be prepared and filed. Two questions, however, might be considered as arising: 1) whether Lucey's lawyer had been guilty of ineffective assistance of counsel within our *Beasley* v. *United States*, 491 F. 2d 687 (6th Cir. 1974), rule and 2) whether the case should be remanded to the District Court to take testimony on the question of whether, as claimed by appellee Lucey, the dismissal of his appeal violated equal protection since no such action had been taken on any other case under similar facts.

Study of this record convinces this court that this case should be remanded to determine the equal protection issue set forth immediately above.

This case is ordered remanded for such purpose with power to take any needed testimony.

JONES, Circuit Judge, dissenting. It is an important duty of counsel to ensure that his client has an opportunity to present his claims at an appeal of right. Appellate counsel's failure to comply with Kentucky's Rule of Appellate Procedure 1.095(a)(1), causing the dismissal of the appeal without a consideration of the merits, is *ineffective* assistance of counsel violative of due process. *Gilbert* v. *Sowders*, No. 79-3597 (6th Cir. April 2, 1981) (per curiam) (Jones, concurring. *See also Anders* v. *California*, 386 U. S. 745 (1967); *Benoit* v. *Wingo*, 423 F. 2d 880, 883 (6th Cir. 1970). Consequently, I would affirm the judgment of the district court granting Seabold's petition for writ of habeas corpus.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON

Civil Action No. 78-134

KEITH E. LUCEY . . . . . *Petitioner*

v.

WILLIAM E. SEABOLD, ET AL. . . . *Respondent*

MOTION TO REISSUE CONDITIONAL WRIT OF HABEAS CORPUS

Comes now the petitioner, Keith E. Lucey, by counsel, and requests this Court to reissue the conditional writ of habeas corpus in the above-captioned case which was originally entered on November 6, 1979. As grounds for this Motion, the petitioner states as follows:

1. In the Judgment entered on November 6, 1979, this Court, in granting petitioner a conditional writ of habeas corpus, adopted in full the Magistrate's Report and Recommendation. That Report concluded that "the petitioner was denied the effective assistance of counsel on appeal when his retained attorney failed to file a Statement of Appeal, thereby resulting in the dismissal of the petitioner's appeal."

2. The respondent appealed this Court's decision to the United States Court of Appeals for the Sixth Circuit. In a decision rendered on April 2, 1981, the Sixth Circuit remanded the petitioner's case to this Court for the purpose of determining whether the dismissal of the petitioner's state appeal constituted a denial of equal protection of law. As was stated in the *per curiam* opinion:

> Two questions, however, might be considered as arising: . . . 2) whether the case should be remanded to the District Court to take testimony on the question *of whether, as claimed by appellee Lucey*, the dismissal of his appeal violated equal protection since no such action had been taken on any other case under similar facts. Study of this record convinces this court that this case should be remanded to determine the equal protection issue set forth immedately above. (Master Slip Opinion, at p. 2; emphasis added).

3. As explained to this Court at the hearing on March 15, 1982, neither the petitioner Lucey nor the respondent Seabold ever presented an equal protection clause issue to the Sixth Circuit, either by written pleadings or at oral argument. The same issue has been continually presented to the Court of Appeals of Kentucky, the Supreme Court of Kentucky, this Court, and the Sixth Circuit—whether the petitioner was denied his due process right to the effective assistance of counsel on appeal when his state appeal was dismissed because of the procedural error of his attorney. Since the parties to this action have essentially agreed at all stages of the proceedings concerning the facts surrounding this issue, there is no need for this Court to conduct an evidentiary hearing in the above-captioned case.

4. It should be noted that cases decided after this Court's judgment in the petitioner's case supports this Court's prior ruling.

In *Cleaver v. Bordenkircher*, Memorandum Opinion (ED Ky., May 30, 1979), Judge Hermansdorfer concluded that there was a due process right to the effective assistance of appellate counsel:

> The Public Advocate has conceded and the Commonwealth does not controvert that the Public Advocate's failure to timely file petitioner's appellate brief after

> three extensions is representation less effective than that expected of ". . . a lawyer with ordinary training and skill in criminal law. . . ." *Id.* at 697. As the Supreme Court stated in *Ross*, the case most heavily relied on by the Commonwealth, a state criminal defendant is entitled to have his ". . . claims of error . . . organized and presented in a lawyerlike fashion to the Court of Appeals. . . ." *Ross v. Moffitt, supra* at 615. Because of the Public Advocate's failure to adequately represent him, petitioner was deprived of such a presentation. *Id.*, at p. 6.

In the subsequent appeal of the cited case, the Sixth Circuit adopted Judge Hermansdorfer's analysis. *Cleaver v. Bordenkircher*, 634 F. 2d 1010, 1012 (6th Cir. 1980).

In *Gilbert v. Sowders*, 646 F. 2d 1146 (6th Cir. 1981), the case originated "from a situation where retained counsel violated a highly technical procedural rule which resulted in Gilbert's [state appeal] being dismissed." *Id.*, at 1147. In the cited case, the "technical violation" consisted of the failure of the defense counsel to insure that an order granting an extension of time "was timely entered." *Id.* Gilbert's direct appeal to the Supreme Court of Kentucky was subsequently dismissed due to this error by counsel. *Id.*

The Sixth Circuit initially recognized that "Kentucky has . . . a right to enforce its own rules of procedure . . ." *Id.* However, the Court also concluded that under the facts presented, "the failure of the Kentucky Supreme Court to grant appellant's counsel's motions for reconsiderations of the dismissal of the appeal was arbitrary and capricious, and an abuse of due process of law." *Id.*

The petitioner Lucey submits that the facts of his case cannot be differentiated from those encountered in *Gilbert*. His appeal to the Court of Appeals of Kentucky was dismissed because his retained counsel failed to file a State-

ment of Appeal—even though the exact same information was contained in the other pleadings filed with that Court. Solely because of this non-jurisdictional, technical violation of the Kentucky Rules of Appellate Procedure, the petitioner lost his right under the Kentucky Constitution to a direct appeal of his conviction.

If the "technical violation" of *Gilbert* amounts to a violation of due process of law, then so do the facts and circumstances of the petitioner's case.

5. The petitioner's case is now somewhat in a state of limbo which needs to be clarified. Petitioner submits that the reissuance of the conditional writ of habeas corpus, originally entered by this Court on November 6, 1979, would clarify the status of his case.

Wherefore, the petitioner respectfully requests this Court to reissue the conditional writ of habeas corpus in the above-captioned case which was originally entered on November 6, 1979.

Respectfully submitted,

(s) William M. Radigan
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Frankfort, Kentucky 40601

(s) William M. Nixon by W.M.R.
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Richmond, Kentucky 40475
Co-Counsel for Petitioner

(Certificate and Notice omitted)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON

Civil Action No. 78-134

KEITH E. LUCEY . . . . . *Petitioner*

v.

WILLIAM SHADDIX, ET AL. . . . . *Respondent*

RESPONSE TO MOTION

As directed by this court, respondent by counsel presents this response to motion, and status of case.

1. Respondent agrees with petitioner that petitioner has never raised an equal protection claim either in this court or in the United States Court of Appeals for the Sixth Circuit. Had petitioner done so, however, respondent respectfully submits that petitioner would have found it impossible to show facts supporting such a claim. Perhaps that is why the equal protection claim was never raised. Accordingly, respondent further agrees with petitioner that there is no need for this court to conduct an evidentiary hearing on a non-existent equal protection matter.

2. Respondent submits that, upon reflection, this court should reconsider its prior decision herein, and issue an order dismissing the petition for writ of habeas corpus. This is because petitioner suffered no Constitutionally protected due process deprivation when his state-court appeal was lawfully dismissed. When given the opportunity, the Sixth Circuit found no Constitutional deprivation, either. Dismissing the petition would in no way conflict with the

Sixth Circuit, and exposition by this court could assist that court, should petitioner appeal.

State appellate review is not required by Constitutional *due process*. Such appeal is wholly within the *discretion* of the state to allow or not to allow, upon such *terms* as the state *alone deems* proper. *McKane* v. *Durston*, 153 U. S. 684, at 687-688 (1894). Assistance of counsel is a *due process* right, *Powell* v. *Alabama*, 287 U. S. 45 (1932).

There being no Constitutional due process entitlement to state-court appeal, and assistance of counsel being a due process right which does not Constitutionally exist at appeal (it exists only at trial), and the parties being in agreement that there is no equal protection question herein, it is clear that petitioner suffered no Constitutional deprivation when his state appeal was lawfully dismissed.

The vitality of *McKane*, explicitly showing the non-existence of Constitutional due process on state appeal, has often been confirmed. See *Andrews* v. *Swartz*, 156 U. S. 272, at 275 (1895); *Kohl* v. *Lehlbach*, 160 U. S. 293, at 297, 299 (1895); *Murphy* v. *Massachusetts*, 177 U. S. 155, at 158 (1900); *Ortwein* v. *Schwab*, 410 U. S. 656, at 660 (1973); *Ross* v. *Moffitt*, 417 U. S. 600, at 606 (1974); and *Estelle* v. *Dorrough*, 420 U. S. 534, at 536 (1975).

Furthermore, the 14th Amendment does not draw to itself the provisions of state Constitutions or state law, even at criminal trials. State law is not reviewable by federal courts, *Buchalter* v. *New York*, 319 U. S. 427, at 429, 431 (1943). The law of state appeal, not being a Constitutional due process requirement, is unreviewable state law.

This is why, even at the fundamental *trial* level, the *procedures* of a state do not violate the 14th Amendment simply because another method may *seem* to federal courts to be fairer or wiser or to give a surer promise of protection to a defendant. *Snyder* v. *Massachusetts*, 291 U. S. 97,

at 105 (1934), and *Spencer* v. *Texas*, 385 U. S. 554, at 564 (1967).

What all this Constitutional exposition by the Supreme Court of the United States means, is that trial is fundamental to liberty under the 14th Amendment but appeal is not fundamental, *Ross* v. *Moffitt*, supra, at 610-611. That is to say, whatever a state does or does not do on appeal, as opposed to trial, is of no due process concern to the Constitution or to federal habeas corpus courts.

Appeal is not even Constitutionally fundamental in strictly federal jurisdiction from strictly federal prosecutions. *Heike* v. *United States*, 217 U. S. 423, at 428 (1910); *Bradford* v. *Southern R. Co.*, 195 U. S. 243, at 250 (1904); *United States* v. *Perrin*, 131 U. S. 55, at 57 (1889); *Forsyth* v. *United States*, 9 How 571, at 572 (1850); *Cotton* v. *United States*, 9 How 579, at 580 (1850); and *Abney* v. *United States*, 431 U. S. 651, at 656 (1977).

Thus, whatever state courts do about dismissing appeals does not offend the Constitution. The Constitution does not embrace such appeal in *any* due process fashion. Thus, no relief, Constitutionally, can be granted to petitioner in a federal habeas corpus court.

2. In its own way, the Sixth Circuit's opinion herein agrees with this analysis while nevertheless trying to avoid it, when it says, "There is no question, of course, but that the Court of Appeals has a *perfect right* to demand that such a document be prepared and filed." (emphasis added). Left unsaid is the necessarily correlative right to enforce that right by dismissing appeals for failure to comply with state rules.

The Sixth Circuit attempts to avoid the obvious by raising "two questions":

> 1) Whether Lucey's lawyer had been guilty of ineffective assistance of counsel within our *Beasley* v. *United States*, 491 F. 2d 687 (6th Cir. 1974), rule and

> 2) Whether the case should be remanded to the District Court to take testimony on the question of whether, *as claimed by appellee Lacey*, the dismissal of his appeal violated equal protection since no such action had been taken on any other case under similar facts. (emphasis added).

As we have seen, petitioner himself has dashed the Sixth Circuit's scholarship on point 2. Petitioner, contrary to the Sixth Circuit's assertion, correctly represents to this court that he has never presented an equal protection claim issue to the Sixth Circuit, either by written pleadings or at oral argument, and that because of that and the essential agreement of the parties hereto about the facts, there is no need for this court to conduct an evidentiary hearing.

The Sixth Circuit's scholarly question (but no decision) about *Beasley*, supra, is equally suspect. *Beasley* involved a federal prosecution where due process ineffective assistance of counsel at fundamental trial, and on non-fundamental appeal, was alleged. The court did find due process ineffective assistance of counsel at trial but *did not* find ineffective assistance of counsel on appeal. Therefore, *Beasley* does not and Constitutionally cannot apply to dismissal of state appeal. As has been shown, there is no Constitutional entitlement to due process on appeal, *McKane* and *Ross*, supra. Just wishing it did exist, or thinking it better or wiser if it did, will not make is so. *Snyder* and *Buckalter*, supra. In fact, as this court knows, counsel is not Constitutionally required even in federal habeas corpus actions which directly assert Constitutional deprivation.

The Sixth Circuit, of course, has has great difficulty with this type issue, as is evident from its opinion in this case, in *Gilbert* v. *Sowders*, 646 F. 2d 1146 (6th Cir. 1981), and in *Cleaver* v. *Bordenkircher*, 634 F. 2d 1010 (6th Cir. 1980). Its opinions, obviously, are not at all harmonious, taken together or singly.

For example, reference to the last paragraph of *Cleaver* shows that the Sixth Circuit was most uncertain as to whether its decision would ultimately rest upon equal protection or due process. This is all the more interesting when read in conjunction with the district court's unpublished memorandum opinion in that case, Cleaver v. Bordenkircher (No. 79-204 E.D. Ky., Pikeville, May 30, 1979), cited by petitioner in his motion. A copy of that district court opinion previously was placed before this court.

There, Judge Hermansdorfer pointedly noted that in finding a *due process* right to effective assistance of appellate counsel he relied upon pre-*Ross* opinions of the Sixth Circuit, which of course had direct review power over his court. In so doing, he specifically recognized the lack of clarity as to the basis and thus the extent of any Constitutional due process right to assistance of counsel on state-court appeal, discussing *Ross*, supra. But for the pre-*Ross* Sixth Circuit cases, Judge Hermansdorfer appeared inclined to just the opposite direction, based upon *Ross*.

Ross, of course, explicitly reaffirms the no-due-process doctrine on appeal of *McKane*, reaffirms that it is trial, not appeal, which is fundamental under the 14th Amendment, and appears to be a modern attempt by the Supreme Court to clarify some murky if not aberrant statements which recently had crept into that Court's pronouncements on this matter.

The Sixth Circuit, of course, relegated Judge Hermansdorfer's due process analysis to an alternative basis behind its own equal protection analysis. In this regard, it is well worth noting a parallel in *Cleaver* and in this case.

Judge Hermansdorfer explicitly noted that Mr. Cleaver did not raise an equal protection claim. Yet in its opinion, the Sixth Circuit made an equal protection decision, and

went out of its way to buttress that decision by assuming that respondent never denied an equal protection factual claim!

4. One final practical point will be made. Federal courts Constitutionally approve the dismissal of appeals in their own jurisdiction, based upon default or omission or act of appellate counsel. *See* Rules 14, 16.1 and 33.2 of the Supreme Court and F.R.A.P. 31(c). What act of appellate counsel is worse than a default which causes the entire appeal to be dismissed? The obvious answer, of course, is that there is no worse act for appellate counsel. Since federal courts approve identical appeals dismissal rules for themselves, how can they Constitutionally disapprove such rules of state courts?

Respondent submits that if it is Constitutionally proper for federal courts to dismiss appeals, it is Constitutionally proper for state courts to dismiss appeals. These federal rules are but the practical manifestation of the Constitutional argument herein submitted by respondent.

As petitioner has noted, this issue is not new. Yet so far as respondent knows, no federal court has explained why it is Constitutionally wrong for state courts to dismiss appeals when it is Constitutionally right for federal courts to dismiss appeals under identical circumstances. Respondent earnestly and respectfully submits that until such Constitutional explanation is made, federal-state friction will increase, contra to the command of *Fenner v. Mata*, ____ U. S. ____, 101 S. Ct. 764, at 770-771 (1980). In the event respondent's primary Constitutional argument is rejected by this court, respondent earnestly requests this court to explain the above double standard regarding state and federal rules of dismissal.

Wherefore, for the reasons and authority presented, respondent prays that this court reconsider its prior order herein and enter a new order and judgment dismissing the petition for writ of habeas corpus, upon a determination that no Constitutional deprivation befell the petitioner on state appeal.

Respectfully submitted,
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Attorney General

(s) Gerald Henry
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Counsel for Respondent

(Certificate and Notice omitted)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON

Civil Action No. 78-134

KEITH E. LUCEY . . . . . *Plaintiff*

v.

WILLIAM SEABOLD, ET AL. . . . . *Defendant*

STIPULATION

It is hereby stipulated by and between the Petitioner, Lucey and the Respondent, Seabold, that there is no equal protection issue in the above-captioned case.

This the 25th day of May, 1982.

(s) William M. Radigan
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Office for Public Advocacy
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Frankfort, Kentucky 40601

(s) Gerald Henry
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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON

Civil No. 78-134

KEITH E. LUCY . . . . . *Petitioner*

v.

WILLIAM SEABOLD, ET AL. . . . *Respondents*

JUDGMENT

The Petitioner having filed a Motion to Reissue the Conditional Writ of Habeas Corpus heretofore granted on November 6, 1979 and the Respondents having filed a response thereto, and the Court being sufficiently advised, IT IS THEREFORE CONSIDERED AND ADJUDGED HEREIN as follows:

(1) That the Petitioner's Motion to Reissue a Conditional Writ of Habeas Corpus be, and the same is hereby, sustained, and it is directed that the Writ issue herein subject to the qualifications set out in numerical paragraph (2) hereof. *Beasley* v. *United States*, 491 F. 2d 687 (6th Cir. 1974); *Gilbert* v. *Sowders*, 646 F. 2d 1146 (6th Cir. 1981).

(2) That execution of the subject Writ of Habeas Corpus is stayed for a period of one-hundred-twenty (120) days during which the Commonwealth of Kentucky is given the opportunity to reinstate the Petitioner's direct appeal or initiate proceedings to retry the Petitioner.

This the 10th day of September, 1982.

(s) Bernard T. Moynahan, Jr.
Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON

Civil Action No. 78-134

KEITH E. LUCY . . . . . *Petitioner*

v.

WILLIAM SEABOLD, ET AL. . . . *Respondents*

MEMORANDUM OPINION

Petitioner, following his conviction in the Circuit Court of Madison County, Kentucky of the offenses of trafficking in a Schedule I Controlled Substance (LSD) and trafficking in a Schedule II Controlled Substance (cocaine), was sentenced to periods of confinement of five years and ten years, to be served concurrently. He sought to collaterally attack the legality of his confinement by the filing of a Petition for Writ of Habeas Corpus, claiming denial of his Constitutional right to the effective assistance of counsel on appeal. In a Judgment entered on November 6, 1979, this Court adopted the Magistrate's Report and Recommendation which stated that "the petitioner was denied the effective assistance of counsel on appeal when his retained attorney failed to file a Statement of Appeal, thereby resulting in the dismissal of the petitioner's appeal." The petitioner was granted a conditional Writ of Habeas Corpus.

Upon appeal, the United States Court of Appeals for the Sixth Circuit rendered a decision on April 2, 1981 in which the petitioner's cause was remanded to this Court for the purpose of determining whether the dismissal of the

petitioner's state appeal constituted a denial of equal protection of law.

In a subsequent hearing before this Court, counsel for both parties agreed an evidentiary hearing was unnecessary. A stipulation was filed wherein the parties stated that no equal protection issue exists in this action.

On March 19, 1982, the petitioner filed a motion requesting the reissuance of the conditional Writ of Habeas Corpus heretofore granted. The sole issue upon consideration of said motion is whether the petitioner was denied his due process right to the effective assistance of counsel on appeal when his state appeal was dismissed because of a procedural error of his attorney.

The Sixth Circuit Court of Appeals has recognized a due process right to the effective assistance of appellate counsel. *Gilbert* v. *Sowders*, 646 F. 2d 1146 (6th Cir. 1981); *Cleaver* v. *Bordenkercher*, 634 F. 2d 1010 (6th Cir. 1980). In *Gilbert* v. *Sowders*, *supra*, the petitioner's retained counsel violated a technical procedural rule which resulted in the dismissal of his state appeal. The federal district court granted a Petition for Writ of Habeas Corpus after determining that the petitioner had been denied effective assistance of appellate counsel. The Sixth Circuit Court of Appeals, affirming the issuance of the Writ, concluded that the failure of the Kentucky Supreme Court to reconsider the dismissal of the petitioner's appeal was "arbitrary, capricious, and an abuse of due process of law, as protected by the United States Constitution." 646 F. 2d at 1147. It is clear from the foregoing opinion that an "appellate counsel's failure to perform procedural duties necessary to prosecute an appeal is a denial of due process" in this Circuit. 646 F. 2d at 1150 (Jones, J., concurring).

In the instant case, the failure of petitioner's attorney to file a Statement of Appeal resulting in the foreclosure of state appellate review denied him the effective assistance of

counsel. *Beasley v. United States*, 491 F. 2d 687 (6th Cir. 1974). Accordingly, the petitioner's motion for reinstatement of a conditional Writ of Habeas Corpus must be, and the same is, hereby sustained. A Judgment will this day be entered directing that a Writ of Habeas Corpus issue herein subject to the qualifications that the subject Writ be stayed for a period of one-hundred-twenty (120) days during which the Commonwealth of Kentucky is given the opportunity to reinstate the petitioner's direct appeal or initiate proceedings to retry the petitioner.

This the 10th day of September, 1982.

(s) Bernard T. Moynahan, Jr.
Judge

No. 82-5896

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

KEITH E. LOVEY, - - - - *Petitioner-Appellee,*

v.

PAUL KAVANAUGH, Supt., et al., - *Respondents-Appellants.*

APPEAL from the United States District Court
for the Eastern District of Kentucky.

Decided and Filed January 12, 1984

Before: EDWARDS and CONTIE, Circuit Judges; SPIEGEL, District Judge.*

EDWARDS, Circuit Judge. In this appeal the State of Kentucky appeals an order entered by Chief Judge Bernard Moynahan of the Eastern District of Kentucky granting a petition for writ of habeas corpus to appellee Keith E. Lovey. The essential facts and issue at law are set forth effectively in the opinion entered after a remand to Judge Moynahan, which opinion reads, in part, as follows:

> Petitioner, following his conviction in the Circuit Court of Madison County, Kentucky of the offenses of trafficking in a Schedule I Controlled Substance (LSD) and trafficking in a Schedule II Controlled Substance (cocaine), was sentenced to periods of confinement of

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*Honorable S. Arthur Spiegel, U.S. District Judge for the Southern District of Ohio, sitting by designation.

five years and ten years, to be served concurrently. He sought to collaterally attack the legality of his confinement by the filing of a Petition for Writ of Habeas Corpus, claiming denial of his Constitutional right to the effective assistance of counsel on appeal. In a Judgment entered on November 6, 1979, this Court adopted the Magistrate's Report and Recommendation which stated that "the petitioner was denied the effective assistance of counsel on appeal when his retained attorney failed to file a Statement of Appeal, thereby resulting in the dismissal of the petitioner's appeal." The petitioner was granted a conditional Writ of Habeas Corpus.

Upon appeal, the United States Court of Appeals for the Sixth Circuit rendered a decision on April 2, 1981 in which the petitioner's cause was remanded to this Court for the purpose of determining whether the dismissal of the petitioner's state appeal constituted a denial of equal protection of law.

In a subsequent hearing before this Court, counsel for both parties agreed an evidentiary hearing was unnecessary. A stipulation was filed wherein the parties stated that no equal protection issue exists in this action.

On March 19, 1982, the petitioner filed a motion requesting the reissuance of the conditional Writ of Habeas Corpus heretofore granted. The sole issue upon consideration of said motion is whether the petitioner was denied his due process right to the effective assistance of counsel on appeal when his state appeal was dismissed because of a procedural error of his attorney.

The Sixth Circuit Court of Appeals has recognized a due process right to the effective assistance of appellate counsel. *Gilbert* v. *Bowders*, 646 F. 2d 1146 (6th

Cir. 1981); *Cleaver* v. *Bordenkercher*, 634 F. 2d 1010 (6th Cir. 1980).

• • •

In the instant case, the failure of petitioner's attorney to file a Statement of Appeal resulting in the foreclosure of state appellate review denied him the effective assistance of counsel. *Beasley* v. *United States*, 491 F. 2d 687 (6th Cir. 1974). Accordingly the petitioner's motion for reissuance of a conditional Writ of Habeas Corpus must be, and the same is, hereby sustained. A Judgment will this day be entered directing that a Writ of Habeas Corpus issue herein subject to the qualifications that the subject Writ be stayed for a period of one-hundred-twenty (120) days during which the Commonwealth of Kentucky is given the opportunity to reinstate the petitioner's direct appeal or initiate proceedings to retry the petitioner.

At appellate hearing before this court, counsel for the State of Kentucky argued with great vehemence that the District Judge's judgment was clearly erroneous and should be reversed since there is "no constitutional due process entitlement to state-court appeal, and assistance of counsel being a due process right which does not exist at appeal (it exists only at trial) . . . it is clear that petitioner suffered no constitutional deprivation when his state appeal was lawfully dismissed."

We believe, however, that the contentions of Kentucky's legal representative in this case are mistaken.

While it is perfectly true that under the Federal Constitution, no state is required to create an appellate system for persons convicted in lower courts of crime, *McKane* v. *Durston*, 153 U. S. 684 (1894), this holding does not extend to exclude federal habeas corpus review of violations of the Fourteenth Amendment occurring in the course of ap-

pellate proceedings created by state law. The cases which may be cited on this score are numerous. *Griffin* v. *Illinois*, 351 U. S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956); *Smith* v. *Bennett*, 365 U. S. 708, 81 S. Ct. 895, 6 L. Ed. 2d 39 (1961); *Draper* v. *Washington*, 372 U. S. 487, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963), and *Ross* v. *Moffit*, 417 U. S. 600 (1974).

In this instance there is no doubt but that appellant lost his right to appeal when as found by the District Court, "his retained attorney failed to file a statement of Appeal."

In this case it should be noted that Kentucky's Constitution was amended to provide for at least one appeal as a matter of right as of January 1, 1976 before defendant's conviction. See Section 115, Constitution of Kentucky. *See also Blankenship* v. *Commonwealth of Kentucky*, App. 554 S. W. 2d 826 (Ky. App. 1977).

We recognize that counsel did file an appellate brief which he contends contained the "essentials" of Kentucky's Rule of Appellate Procedure 1.030(a)(1). He also concedes that he did not file the Statement of Appeal provided for by R.A.P. 1.030(a)(1). See Appendix A attached.

The District Judge's findings of fact are not clearly erroneous. We agree with his conclusion that petitioner "was denied the effective assistance of counsel."

The judgment of the District Court is affirmed.

APPENDIX A

Kentucky Rule of Appellate Procedure (RAP) 1.030(a)(1).

RAP 1.030(a) states that the pleadings in the Court of Appeals of Kentucky must contain, *inter alia*, "[t]he same information as required in a statement of appeal in the Supreme Court pursuant to RAP 1.030."

RAP 1.030 states:

> In all cases the appellant shall file with the record on appeal a statement setting forth:
>
> (a) The name of each appellant and each appellee (only parties named are before the court — "et al." and "etc." are not proper designations of parties).
>
> (b) The name and address of counsel for each appellant and each appellee.
>
> (c) The name and address of the trial judge.
>
> (d) The date the judgment appealed from was entered, and the page of the record on appeal on which it may be found. In civil cases the date of judgment shall be the date the clerk made the notation required by CR 77.04(2). In criminal cases the date of judgment shall be the date the clerk served the notice required by RCr 12.55 as shown by his endorsement on the retained copy of the notice.
>
> (e) The date the notice of appeal was filed and the page of the record on appeal on which it may be found.
>
> (f) Such of the following facts, if any, as are true:
>
> (1) a notice of cross-appeal has been filed;
>
> (2) a supersedeas bond has been executed;
>
> (3) Any reason the appeal should be advanced;

(4) this is a suit involving multiple claims and judgment has been made final under CR 54.02;

(5) there is another appeal pending in a case which involves the same transaction or occurrence, or a common question of law or fact with which this appeal should be consolidated, giving the style of the other case;

(6) the appellant is free on bond.

RESPONDENT'S

BRIEF

Office-Supreme Court, U.S.
FILED
JUL 16 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1378

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PAUL KAVANAUGH, Superintendent, Blackburn Correctional Complex and DAVID L. ARMSTRONG, Attorney General
Petitioners,

v.

KEITH E. LUCEY,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

---

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT GUARANTEES A CRIMINAL DEFENDANT THE RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL ON HIS DIRECT APPEAL FROM HIS CONVICTION?

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE[1]

Contrary to his plea, the respondent was found guilty by the jury in the Madison Circuit Court (Richmond, Kentucky) on one count of trafficking in a Schedule I controlled substance (LSD) and one count of trafficking in a Schedule II controlled substance (cocaine), both in violation of Kentucky Revised Statutes (KRS) 218.990 (Joint Appendix, hereinafter designated J.A., pp. 3a-5a). The respondent was sentenced to a total of fifteen (15) years of imprisonment, and, additionally, was fined a total of fifteen thousand dollars ($15,000.00). Final judgment was entered on March 29, 1977, and a timely Notice of Appeal was filed by respondent's counsel.

Following the timely preparation of the record on appeal, the respondent on September 12, 1977, filed a Brief for Appellant with the Court of Appeals of Kentucky. (J.A., pp. 6a-36a). The issues presented in this timely pleading were the following:

I.

WAS IT ERROR TO ADMIT PHOTOGRAPHS OF THE APPELLANT INTO EVIDENCE WHICH LACKED ANY PROBATIVE VALUE AND SERVED ONLY TO MISLEAD AND TO AROUSE THE PASSION AND PREJUDICE OF THE JURY?

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[1] The respondent Lucey essentially concurs with the Statement of the Case contained on pages 1 through 10 of the Brief for Petitioners insofar as it reviews the proceedings of this case in the federal courts. However, in order to provide a complete understanding of the history of this case, the respondent feels that a more detailed review of the proceedings in the Kentucky Courts is necessary.

II.

DID THE CHARGE TO THE JURY MEET THE REQUIREMENTS OF THE DUE PROCESS OF LAW?

III.

WAS THE APPELLANT DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY IMPROPER CONDUCT DURING THE TRIAL AND BY PREJUDICIAL COMMENTS MADE BY THE PROSECUTOR DURING HIS SUMMATION?

Interestingly enough, the attorney for the Commonwealth requested and was granted an extension of time to file the Brief for Appellee. On December 13, 1977, the Commonwealth filed their appellate brief. Additionally, the Commonwealth filed a motion to dismiss the respondent's direct appeal on the ground that the respondent had failed to comply with the requirements of Kentucky Rule of Appellate Procedure (RAP) 1.086(a)(1).

In an Order entered on January 11, 1978, the Court of Appeals of Kentucky dismissed the respondent's direct appeal because "the appellant has failed to supply the information required by RAP 1.086(a)(1)". (J.A., p. 37a).

On January 17, 1978, the respondent's counsel filed a Motion for Reconsideration with the Court of Appeals of Kentucky. (J.A., pp. 38a-40a). In essence, the respondent's counsel argued that all of the information required by RAP 1.086 and RAP 1.090 were contained in the Brief for Appellant filed on September 12, 1977. Consequently, the respondent argued that he had substantially complied with the requirements of the rule of appellate procedure. Additionally, the respondent tendered a Statement of Appeal which complied with the applicable appellate rules.

However, the Court of Appeals of Kentucky in an Order entered on February 7, 1978, summarily overruled respondent's motion. (J.A., p. 41a).

On February 27, 1978, the respondent filed a Motion for Discretionary Review with the Supreme Court of Kentucky requesting that the actions taken by the Court of Appeals of Kentucky be reviewed. In his pleadings, the respondent raised the following specific issues:

I.

DID THE KENTUCKY COURT OF APPEALS DENY THE MOVANT HIS CONSTITUTIONAL RIGHT TO AN APPEAL AND THE DUE PROCESS OF LAW AS GUARANTEED BY THE KENTUCKY CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA BY DISMISSING HIS APPEAL ON PROCEDURAL GROUNDS WHERE THERE WAS GOOD FAITH SUBSTANTIAL COMPLIANCE AND NO PREJUDICE TO THE COMMONWEALTH OR TO THE COURT?

II.

IS RAP. 1.086(a)(1) UNCONSTITUTIONALLY VAGUE, AMBIGUOUS, AND INDEFINITE TO THE EXTENT THAT A LITERAL AND REASONABLE INTERPRETATION OF THE RULE DENIED THE MOVANT THE DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

III.

DID THE RESPONDENT WAIVE HIS RIGHT TO MOVE TO DISMISS THE APPEAL WHEN HE COMPLETED ALL OF THE PROCEDURAL STEPS REQUIRED FOR AN ADJUDICATION OF THE MERITS?

IV.

WAS THE MOVANT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN THE KENTUCKY COURT OF APPEALS REFUSED TO CONSIDER THE CASE ON THE MERITS BECAUSE OF AN ALLEGED PROCEDURAL VIOLATION OF THE KENTUCKY SUPREME COURT RULES?

On June 6, 1978, the Supreme Court of Kentucky denied the petitioner's Motion and specifically affirmed the dismissal of the appeal by the Court of Appeals of Kentucky (J.A., p. 42a).

Subsequently, respondent filed an action in the Madison Circuit Court pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42 requesting the trial court to either vacate the judgment or to grant a belated appeal. This motion was denied on August 2, 1978. In view of the decision of the Supreme Court of Kentucky in *Cleaver* v. *Commonwealth*, Ky., 569 S.W.2d 166 (1978), no appeal from this ruling was taken.

The petitioners' recitation of the proceedings in the United States District Court for the Eastern District of Kentucky and the United States Court of Appeals for the Sixth Circuit are essentially correct. (Brief for Petitioners, hereinafter designated B.P., pp. 5-10). Rather than unnecessarily repeat these events, the respondent will adopt them.

SUMMARY OF ARGUMENT

The respondent has, under the Kentucky Constitution, an absolute right to a direct appeal of his criminal conviction. As with any right, a direct appeal can be implemented only in compliance with rules of procedure,

designed and applied to provide an orderly and efficient appellate system. Kentucky courts traditionally have strictly enforced their appellate rules in three areas: (1) defects in the Notice of Appeal; (2) defective designations of record; and (3) untimely filing of the record on appeal. Even though the Kentucky courts have concluded in the past that a statement of appeal is merely a record-keeping document and is non-jurisdictional, the respondent's direct appeal to the Court of Appeals of Kentucky was dismissed solely because the respondent's appellate counsel failed to file a statement of appeal along with his timely brief on appeal.

Even though an appeal may not be a constitutional right, many courts consider a direct review of a conviction to be a critical stage of a criminal proceeding. As such, a criminal defendant has a constitutional right to an attorney on a direct appeal. The appellate counsel serves two roles—he not only serves his client by actively presenting the critical issues, legal analysis, and reasoning urging a reversal of the conviction, but also assists the court in reaching its ultimate determination of the merits of a case. It is because of this inherent role in a direct appeal of a criminal conviction that the courts have unanimously concluded that an attorney cannot abandon his client in the middle of an appeal. Both ethically and constitutionally, the counsel on appeal must represent his client to the best of his ability. For these same reasons, where a defendant loses his right to a direct appeal as a result of a mistake by his attorney, it is the functional equivalent of having no representation at all.

Both the due process clause and the equal protection clause of the Fourteenth Amendment apply to the rights of individuals on direct appeal. Due process of law emphasizes fundamental fairness between the state and an indi-

vidual, while equal protection seeks to prevent disparity in treatment by a state between different classes of individuals. Because of the applicatioon of due process to the appellate process, this Court has held appellate counsel to a minimum level of representation. Every federal circuit, as well as many state courts, have concluded that due process mandates the effective assistance of appellate counsel. In sharp contrast, the petitioners are unable to direct this Court to one case decision, either federal or state, which concludes that due process does not apply to an appeal.

There is no question that rules of appellate procedure serve a necessary and important function, and that the states indeed have the authority to dismiss appeals for procedural violations. However, it is equally true, as recognized by courts around the country, that less stringent sanctions than dismissal are also available. Courts have noted, for instance, that sanctions against the attorney can be applied, or substitute counsel can be appointed. These lesser resolutions can assure compliance without the necessity of utilizing the ultimate sanction—dismissal. This is especially true under the facts and circumstances of the respondent's case where his direct appeal was dismissed for failure to file a statement of appeal, a nonjurisdictional document. Certainly the respondent's case is an example of a situation where the state's interest in the expeditious and orderly processing of appeals is outweighed by the respondent's right to a direct appeal from his conviction.

Finally, it must be emphasized that the decision to appeal is one of those ultimate conclusions left exclusively, after advice of counsel, to the defendant. The respondent Lucey has been actively and continuously attempting to seek appellate review of his conviction since 1977.

He should not be held liable for a mistake made seven (7) years ago by his appellate attorney.

ARGUMENT

THE CONCLUSION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT THAT THE RESPONDENT WAS DENIED HIS DUE PROCESS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS FACTUALLY CORRECT AND BASED UPON SUBSTANTIAL AND CONTROLLING LEGAL PRECEDENT.

1. The Respondent's Right To A Direct Appeal Under Kentucky Law.

As discussed in detail in the Brief for Petitioners, it has long been recognized that a state is not obligated under the provisions of the United States Constitution to provide a criminal defendant the right to a direct appeal from a criminal conviction. *McKane* v. *Durston*, 153 U.S. 684 (1894).[1] Kentucky appellate courts have also recognized this limitation on a defendant's constitutional rights. *McIntosh* v. *Commonwealth*, Ky., 368 S.W.2d 331 (1963).

However, the Commonwealth of Kentucky has long recognized the need for appellate review of a criminal conviction. Prior to 1976, a defendant had a statutory right of appeal under the provisions of KRS 21.140(1). Effective January 1, 1976, Section 115 of the Kentucky Constitution guaranteed a criminal defendant at least one

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[1] However, this Court has previously noted that "[p]resent federal law has made an appeal from a District Court's judgment of conviction in a criminal case what is, in effect, a matter of right." *Coppedge* v. *United States*, 369 U.S. 438, 441 (1962). *See* also: Mr. Justice Brennan's dissenting opinion in *Jones* v. *Barnes*, ___ U.S. ___, 103 S.Ct. 3308, 3315 at n.1 (1983).

appeal as a matter of right.[1] *See: Blankenship* v. *Commonwealth*, Ky.App., 554 S.W.2d 898, 900-901 (1977), where the Court of Appeals of Kentucky recognized this change in a defendant's right to appeal.

The petitioners have attempted to characterize the right to a direct appeal in Kentucky as being "a conditional opportunity or conditional right to pursue an appeal." They reason that any appeal is conditioned upon strict compliance with rules of appellate procedure. (Brief for Petitioners, pp. 40-44).

Respondent must respectfully disagree with this characterization. The right to appeal is, according to Section 115 of the Kentucky Constitution, an absolute right to a direct appeal. However, as with any right, there are certain means by which to implement the right to a direct appeal. Respondent agrees that rules of procedure are absolutely necessary for an orderly and expeditious processing of appeals.

The Supreme Court of Kentucky in *Foremost Insurance Company* v. *Shepard*, Ky., 588 S.W.2d 468 (1979), discussed this very aspect:

> It is our opinion, however, that *the right of appeal* guaranteed by Section 115 may be conditioned upon strict adherence to orderly rules of procedure. "Substantive rights, even of constitutional magnitude, do not transcend procedural rules, because without such rules those rights would smother in chaos and could not survive." *Brown* v. *Commonwealth*, Ky., 551 S.W.2d 557, 559 (1977). *Id.*, at 468; (emphasis added).

However, it is not true that every violation of a procedural rule does, or should, lead to the dismissal of an appeal.

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[1] "In all cases, civil and criminal, there shall be allowed as a matter of right at least one appeal to another court . . ."

As was stated by the Court of Appeal of Kentucky in *Milby* v. *Mears*, Ky. App., 580 S.W.2d 724, 728 (1979):

> [N]oncompliance with the rules governing briefs does not require that a brief always be sticken. The appropriate remedy for such noncompliance with the rules must be left to the sound discretion of the appellate court.

An examination of Kentucky appellate decisions dealing with noncompliance with the rules of appellate procedure reveals that three areas of violations have been dealt with strictly.:

(1) various defects in the filing of a Notice of Appeal: *Rogers* v. *Henderson*, Ky.App., 612 S.W.2d 743 (1980)[2]; *Preston* v. *Williamson*, Ky., 483 S.W.2d 448 (1972); *Yocum* v. *Franklin County Fiscal Court*, Ky.App., 545 S.W.2d 296 (1976)[3]; *Foremost Insurance Company* v. *Shepard*, *supra*;

(2) various defects in the filing of a designation of record: *Motorists Mutual Insurance Company* v. *Mercer*, Ky., 462 S.W.2d 188 (1970)[4]; *Webb* v. *Webb*, Ky.App., 547 S.W.2d 448 (1976); *Johnson* v. *Maloney's of Olive Hill, Inc.*, Ky.App., 569 S.W.2d 704 (1978); *Seale* v. *Riley*, Ky.App., 602 S.W.2d 441 (1980);

(3) the untimely filing of the record on appeal: *Lucy* v. *Johnson*, Ky., 460 S.W.2d 827 (1980).

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[2] However, the "mandatory and jurisdictional" time limitation for filing a Notice of Appeal may be extended for ten days upon showing of excusable neglect.

[3] The name of each party must be given. However, because of recent rule changes, the appeal was not dismissed.

[4] The appeal in *Mercer* was dismissed because there was no showing of excusable neglect under CR 6.02.

Of particular interest to the respondent's case is the fact that there is only one Kentucky decision dealing with a defective statement of appeal. In denying a motion to dismiss the appeal filed because the statement of appeal contained erroneous information, the Kentucky appellate court in *England* v. *Spalding*, Ky., 460 S.W.2d 4, 6 (1970), explained:

> RCA 1.090 is designed to assist this court in *processing records* and compliance is *not jurisdictional*. . . . We do not consider the failure of appellants to specify in their statement of appeal the supplemental judgment entered December 26, 1967, as being fatal to the appeal. (emphasis added).

It becomes apparent, therefore, that the respondent's appeal was dismissed by the Court of Appeals of Kentucky because the failure to timely file a statement of appeal made processing the court's own records more difficult.[6]

A review of the respondent's appellate rights under Kentucky law would not be complete without a brief examination of remedies for a defendant who has lost his right to an appeal through the fault of his attorney. Eighteen (18) years ago in *Hammershoy* v. *Commonwealth*, Ky., 398 S.W.2d 883 (1966), the court examined a situation where an attorney withdrew from a case after filing the notice of appeal. In granting the defendant relief on his postconviction motion, the Kentucky court recognized "that an attack on the trial judgment" is "the appropriate remedy for frustrated right of appeal" "subject to the condition that such relief may be denied if within a reasonable time the state provides the [defendant] an appeal on

[6] It should be recalled that respondent's counsel tendered a Statement of Appeal with the Court of Appeals of Kentucky with his Motion for Reconsideration of January 17, 1978. See discussion on state's interest in dismissing appeal at pp. 29-30, *infra*.

the merits."[7] *Id.*, at 884. The *Hammershoy* court directed the following remedy:

> The appellant demanded the assistance of counsel on appeal and was denied it. He was indigent. He must therefore be provided with a review of his conviction with the help of counsel or the conviction must be vacated. The trial court shall have 30 days following issuance of the mandate in this proceeding in which to appoint counsel or vacate the conviction and sentence. *Id.*

More recently, in *Stahl* v. *Commonwealth*, Ky., 613 S.W.2d 617, 618 (1981), the Supreme Court of Kentucky reaffirmed the *Hammershoy* doctrine:

> A right to a belated appeal or to reinstatement of a lapsed appeal can be granted only by the appellate court that is to entertain it. Cleaver v. Commonwealth, Ky., 569 S.W.2d 166 (1978). However, appellant is not precluded from filing an RCr 11.42 motion in circuit court. This court recognized in *Hammershoy* v. *Commonwealth*, 398 S.W.2d 883 (1966) that an attack on the trial judgment is the appropriate remedy for a frustrated right of appeal. The trial court can entertain issues of fact, such as overwork, which might result in ineffective assistance of counsel at the appellate level. If its findings of fact are in appellant's favor, the proper procedure is for the trial court to vacate the judgment and enter a new one, whereupon an appeal may be taken from the new judgment.

In the case at bar, the respondent, who was convicted of the charged offenses after January 1, 1976, im-

[7] In passing, it should be noted that this is the same remedy that has been directed by this Court where it has determined that the defendant has been denied his right to appeal. *See*, e.g.: *Lane* v. *Brown*, 372 U.S. 477 (1963); *Rodriguez* v. *United States*, 395 U.S. 327 (1969).

plemented his rights under the Kentucky Constitution by filing his Notice of Appeal. Even though by his actions the respondent evidenced his desire for appellate review of his conviction, the record well reveals that his case has never been reviewed on the merits. As both the District Court and the Sixth Circuit noted with clarity, the fault for this situation must lie with respondent's appellate counsel.

2. The Role Of The Attorney In The Appellate Process

Throughout their pleadings before this Court, the petitioners have sought to denigrate the function and purpose of an appeal within the criminal justice system. Noting what they describe as "significant differences" between trial and appeal (Brief for Petitioners, pp. 21-22), petitioners contend that the appellate process in a criminal case implicates no fundamental liberty interests cognizable under the due process clause of the Fourteenth Amendment. As a result, petitioners conclude:

> Thus, whatever state courts do about dismissing state appeals does not offend the Constitution on due process grounds. . . . Thus, no relief, constitutionally, can be granted in a United States habeas corpus court for the dismissal of a state appeal. (Brief for Petitioners, p. 44).

The respondent submits that petitioners have failed to realize not only the purpose of an appeal, but also the critical role of an appellate attorney in that process.

Where appellate review is provided a defendant by the state it becomes an "integral part of the . . . trial system for finally adjudicating the guilt or innocence of a defendant." *Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956). More recently, the right to an appeal has been described "as a sword to upset the prior determination of guilt." *Ross* v. *Moffitt*, 417 U.S. 600, 611 (1974). Additionally, an appeal

"is the vehicle by which violations of the right to a fair trial, conducted in accordance with law, may be remedied." *Perez* v. *Wainwright*, 640 F.2d 596, 599 (5th Cir. 1981).

As such, numerous courts have expanded the traditional definition of a "critical stage" of the criminal proceeding from the trial through the appellate level. *Nelson* v. *Peyton*, 415 F.2d 1154, 1159 (4th Cir. 1969); *Wainwright* v. *Simpson*, 360 F.2d 307, 309 (5th Cir. 1966); *Williams* v. *United States*, 402 F.2d 548, 551-552 (8th Cir. 1968); *Ray* v. *State*, Mo., 532 S.W.2d 478, 483 (1975). It is this reason, among others, that mandates the appointment of an attorney for an indigent for a direct appeal. *Douglas* v. *California*, 372 U.S. 353 (1963).

Canon 6 of the Code of Professional Responsibility, American Bar Association (1975), specifically requires that "[a] lawyer should represent a client competently." Indeed, Disciplinary Rule 7-101 requires counsel to represent his client "zealously." These ethical considerations apply to the appellate defense counsel and bind him to a standard of vigorous and competent representation. "The constitutional requirement of substantial equality and fair process can only be attained when counsel acts in the role of an active advocate in behalf of his client." *Anders* v. *California*, 386 U.S. 738, 744 (1967). Indeed, appointed counsel's "role as an advocate requires that he support his client's appeal to the best of his ability." *Id.*

Under our adversary system, it has become a well-established principle that there is no substitute for counsel who acts as an advocate and who makes the best arguments he can on the facts and the law. *High* v. *Rhay*, 519 F.2d 109, 113 (9th Cir. 1975). As long ago as 1958, this Court required appointed counsel to perform more than the role of *amicus curiae*. *Ellis* v. *United States*, 356 U.S. 674 (1958).

Analyzing the implications of *Anders*, the California Supreme Court in *People* v. *Feggans*, 62 Cal.Rptr. 419, 432 P.2d 21, 23 (1967), enumerated the specific responsibilities of appellate defense counsel:

> Counsel must prepare a brief to assist the court in understanding the facts and legal issues in the case. The brief must set forth a statement of the facts with citations to the transcript, discuss the legal issues with citations of appropriate authorities, and argue all issues that are arguable. Moreover, counsel serves both the court and his client by advocating changes in the law if argument can be made supporting changes.

An appellate attorney, in his role as an advocate, is constitutionally required to fully brief and argue all points which, in his judgment, may be sustained on appeal. *United States ex rel. Mattox* v. *Scott*, 366 F.Supp. 1294, 1297 (N.D.Ill., 1973). A necessary corollary of this principle is "that the inexcusable failure of . . . appellate counsel to raise crucial assignments of error, which arguably might have resulted in a reversal," deprives the client "of the effective assistance of appellate counsel to which he was entitled under the Constitution." *In Re Smith*, 87 Cal. Rptr. 687, 471 P.2d 8, 14 (1970).

Examining the role of the defense attorney on appeal, the court in *Johnson* v. *United States*, 360 F.2d 844 (D.C. Cir. 1966), made the following pertinent observation:

> On appeal his [defense counsel's] function is to point to trial errors, if such there be, and expound the applicable rules of law. In short he is to "put his client's best foot forward." *Id.*, at 846.

The appellate counsel "performs an important function by making sure that the reviewing court understands all the salient facts and the relevant legal authorities before reaching a final decision." *Id.* Indeed, "an advocate performs a most important function when by his analysis he presents the critical issues and brings to the Court all the facts and law." *Id.*

In *Mylar* v. *Alabama*, 671 F.2d 1299 (11th Cir. 1982), the Eleventh Circuit commented on the function of an appellate attorney:

> As an "active advocate", appellate counsel is duty bound to affirmatively promote his client's position before the court. Such a duty not only requires counsel to inform the court of errors committed at trial, but additionally mandates that counsel provides legal citations and reasoning to support any claim for relief. Unquestionably a brief containing legal authority and analysis assists an appellate court in providing a more thorough deliberation of an appellant's case: *Id.*, at 1301.

If the petitioners' truncated view of an appeal was correct, then indeed there would be no purpose served by an appellate attorney. There would be no need for any standards by which to measure the attorney's performance. Appellate pleadings for a convicted defendant could then be regarded as a mere perfunctory obligation, capable of summary discharge. Such a position, as advanced by petitioners, flies in the face of a number of pronouncements of this Court.

In *Swenson* v. *Bosler*, 386 U.S. 258 (1967), this Court examined a situation where trial defense counsel, after filing a notice of appeal, withdrew from the case. *Id.*, at 259. As a result the defendant did not have the benefit of a brief prepared by an attorney when the Missouri court reviewed his appeal. In upholding the grant of a writ of habeas corpus, the Court noted the benefits of an appellate attorney to an indigent defendant:

> The assistance of appellate counsel in preparing and submitting a brief to the appellate court which de-

> fines the legal principles upon which the claims of error are based and which designates and interprets the relevant portions of the trial transcript may well be of substantial benefit to the defendant. *Id.*

More recently, in *Jones* v. *Barnes*, ___ U.S. ___, 103 S.Ct. 3308, 3313 (1983), the Court reiterated this position:

> There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review.

The inescapable conclusion is that an appellate attorney performs an essential function on the review of a criminal conviction. With the assistance of counsel on appeal, a defendant "enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf." *Douglas* v. *California*, *supra*, 372 U.S. at 378.

The purpose of an appeal and the role of the appellate attorney are inherently intertwined. Without the active assistance of counsel, a defendant's right to a direct appeal of his criminal conviction becomes a hollow gesture. Similarily, where a defendant loses his right to a direct appeal as a result of a mistake by his attorney, it is "the functional equivalent of having no representation at all." *Cannon* v. *Barry*, 727 F.2d 1020, 1023 (11th Cir. 1984).[8] *Accord: Hollis* v. *United States*, 687 F.2d 257 (8th Cir. 1982); *Doyle* v. *United States*, 721 F.2d 1195 (9th Cir. 1983). As in the case at bar, the failure to grant a criminal

[8] This Court has recently noted that there is a unique category of ineffective assistance of counsel cases where the defendant is denied completely the assistance of an attorney. *United States* v. *Cronic*, ___ U.S. ___, 52 U.S.L.W. 4560, 4563 (1984). *See* also: *Rodriquez* v. *United States*, 395 U.S. 327 (1969).

defendant the effective assistance of counsel on appeal denies the individual his right to appellate review of his conviction.

3. Due Process Of Law And Fundamental Fairness Mandate The Effective Assistance Of Appellate Counsel.

In their pleadings before this Court, the petitioners have presented what amounts to four points of analysis in support of their proposition that there is no right to effective assistance of counsel on appeal:

(1) that, because there is no due process right to appeal, there is no due process right to counsel on appeal (Brief for Petitioners, p. 27);

(2) that, "because there is no due process right . . . to counsel on state appeal", effective assistance of counsel does not apply to the appellate process (Brief for Petitioners, pp. 14, 36-37);

(3) that the Sixth Amendment right to counsel does not apply to appeals (Brief for Petitioners, pp. 28, 31);

and (4) that the only right to appellate counsel flows from the equal protection clause of the Fourteenth Amendment (Brief for Petitioners, p. 36).

The respondent submits that the petitioners have totally misinterpreted (or ignored) a legion of cases from around the country. Interestingly enough, it must be noted that petitioners *were unable*, in their thirty (30) pages of legal argumentation, to refer that Court to *one decision of any jurisdiction* which has concluded that ineffective assistance of counsel does not apply to the appellate stage.[9] In sharp contrast, the respondent notes

[9] Petitioners attempt to picture *Hollin* v. *Sowders*, 710 F.2d 264 (6th Cir. 1983), as reaching this conclusion. (Brief for Petitioners, p. 17). However, the language quoted is purely *dicta* since the Sixth

that a review of decisions of this Court, the federal circuits, and various state courts reveal the same conclusion—due process of law and fundamental fairness mandate the effective assistance of appellate counsel.

a. Decisions Of This Court

During the past twenty (20) years, this Court has given extensive consideration to the rights of indigents on appeal. In *Griffin* v. *Illinois*, 351 U.S. 12, (1956), the Court examined an Illinois rule which allowed appellate review of a criminal conviction only if the defendant paid for the trial transcript. As a result, an indigent who could not afford the cost of obtaining the transcript was precluded from obtaining appellate review of his conviction. Four justices concluded that this procedure violated both the due process clause and the equal protection clause of the Fourteenth Amendment, Mr. Justice Frankfurter, who cast the deciding vote, concluded that the Illinois procedure violated the equal protection clause. *Id.*, 351 U.S. at 22.

In *Smith* v. *Bennett*, 365 U.S. 708 (1961), Iowa required a filing fee in order to file a state habeas petition, and in *Burns* v. *Ohio*, 360 U.S. 252 (1959), the Supreme Court of Ohio required a $20.00 filing fee for leave to appeal a judgment of the Ohio Court of Appeals. Each of these state-imposed financial barriers to an appeal was held to violate the Fourteenth Amendment.

Similarly, this Court invalidated a number of barriers to access to a transcript for appellate purposes. For example, *Lane* v. *Brown*, 372 U.S. 477 (1963), involved an

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Circuit ultimately decided the case on seperate grounds and specifically refused to decide the issue. *Id.*, at 267. *See* also: Judge Merrit's concurring opinion in *Hollin*, at 268.

Indiana statute providing that only the public defender could obtain a free transcript. In *Draper* v. *Washington*, 372 U.S. 487 (1963), an indigent could obtain a free transcript only if he convinced the trial judge that the appeal was not frivolous. Such screening devices were likewise held violative of the Fourteenth Amendment.

In *Douglas* v. *California*, *supra*, the Court expanded their review of appellate process to examine whether an indigent's access to an appellate system was adequate. In concluding that a state must provide counsel for the indigent on his first appeal as of right, the Court relied upon both the due process clause and the equal protection clause of the Fourteenth Amendment:

> But it is appropriate to obseve that a State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a *denial of due process or an "invidious discrimination."*
>
> When an indigent is forced to run this gauntlet of a preliminary showing of merit, the right to appeal does not comfort with *fair procedure*. *Id.*, 372 U.S. at 356-357 (emphasis added).

Contrary to the extensive argument presented by the petitioners to this Court, both clauses of the Fourteenth Amendment apply to an examination of a defendant's access to an appellate system. If there was any question on this matter, it was resolved by the decision in *Ross* v. *Moffitt*, *supra*. This Court explained:

> The precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment. *Neither Clause by itself provides an entirely satisfactory basis for the result reached, each depending on a different inquiry which emphasizes*

different factors. "Due process" emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. "Equal protection," on the other hand emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable. *Id.*, 417 U.S. at 608-609 (emphasis added).

It is precisely because of the due process clause that the Court has made it clear that an indigent's appellate counsel cannot abandon his appeal in midstream. *Entaminger* v. *Iowa*, 386 U.S. 748, 752 (1967), ("Here there is no question but that petitioner was precluded from obtaining a complete and effective appellate review of his conviction . . ."). *See* also *Swenson* v. *Bosler*, *supra*.

In *Anders* v. *California*, *supra*, the Court made it unmistakably clear that an indigent's appellate counsel must provide a minimum level of competent representation. The Court required, as a matter of federal constitutional law, that the indigent receive "that advocacy which a nonindigent defendant is able to obtain." *Id.*, 386 U.S. at 745. The reasoning for this Court's requirement of an "active advocate" on appeal is conclusive as to the issue to whether an individual is entitled to effective assistance of appointed counsel:

> Moreover, such handling would intend to protect counsel from the constantly increasing charge that *he was ineffective* and had not *handled the case with that diligence to which an indigent defendant is entitled*. *Id.*, 386 U.S. at 745 (emphasis added).

The respondent submits that two recent decisions of this Court clarify, if there was any doubt, that counsel on appeal must be effective. In *Jones* v. *Barnes*, ____ U.S. ____, 103 S.Ct. 3308 (1983), the issue originally presented in federal district court in the petition for writ of habeas corpus was "the claim of ineffective assistance by *appel-*

late counsel." *Id.*, 103 S.Ct. at 3311. Even though this Court extensively discussed the ultimate holding of the Second Circuit on this issue, there was not even a hint that this was not a cognizable issue to be raised under 28 U.S.C. § 2254.

More recently, this Court in *United States* v. *Cronic*, *supra*, discussed the various responsibilities of counsel under the Sixth Amendment. In so doing, th Court directly analogized the requirement of trial counsel to its previously established standard for appellate counsel:

> Thus, the adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." *Anders* v. *California*, 386 U.S. 738, 743 (1967). *Id.*, 52 U.S.L.W. at 4562.

If both trial and appellate counsel have the same obligations and responsibilities, then surely effective assistance applies to the appellate process in a criminal case.

b. The Lower Federal Courts

The lower federal courts are unanimous in holding that the critical error of appellate counsel cannot serve to deny his client's right to appeal. In *Macon* v. *Lash*, 458 F.2d 942 (7th Cir. 1972), the petitioner claimed that the incompetence of court-appointed counsel denied his right to appeal. In *Mason*, counsel filed a futile motion for extension of time instead of a timely motion for a new trial. As a result, Mr. Mason lost his right to appeal his conviction for murder. Speaking in words remakably appropriate to the case at bar, the Seventh Circuit stated:

> *With due respect for the view of the Indiana Supreme Court*, we are persuaded that petitioner's federal claim has merit. The Federal constitution contains no requirement that a defendant be given appellate review of his conviction, but if such review is provided,

> appellate procedures and their availability to the indigent must satisfy the Fourteenth Amendment's basic standards of fairness. Since the Supreme Court has held that those standards require the states to waive even nominal filing fees, to provide free transcripts, to appoint counsel, and to refuse to dismiss meritless apeals that have not been adequately evaluated by appellate counsel, *we believe it is equally clear that petitioner's right to appeal could not be forfeited by the critical error of inexperienced court-appointed counsel disclosed by this record. Id.*, 949-950 (emphasis added; footnotes omitted).

In *Benoit* v. *Wingo*, 423 F.2d 880 (6th Cir. 1970), the Sixth Circuit examined a factual circumstance remarkably similar to the case at bar. In the cited case, the appellant's court-appointed attorney filed a timely notice of appeal and obtained an extension of time for perfecting the appeal. *Id.*, at 881. The attorney then wrote the appellant a letter informing him that the appeal "would be wasting our time" and refusing to continue with the appeal. *Id.*, at 881-882. The court, in analyzing the appellant's situation, stated:

> Counsel in his letter to the appellant abandoning the appeal, wrote with such finality that it gave the appellant no opportunity to request him to continue with the appeal. Further, counsel did not leave the appeal in such status that the appellant being confined in prison and being unlearned in law could be expected to pick it up pro se and prosecute it to the conclusion. Neither did he have an opportunity to have the trial judge appoint new counsel to assist him in the prosecution of his appeal. *The appellant was entitled not only to an appeal as a matter of right but he was entitled to have the assistance of counsel in processing that appeal. Id.*, at 883 (emphasis added).

In directing the issuance of a conditional writ of habeas corpus, the court concluded "that the appellant did not

have adequate and effective assistance of counsel in prosecuting his appeal." *Id.*, at 883.

More recently, in *Gilbert* v. *Sowders*, 646 F.2d 1146 (6th Cir. 1981), the Court examined a situation where a state appeal was dismissed due to the fact that an extension order was not filed in time. In his concurring opinion, Judge Jones examined the obligation of the attorney under these circumstances and noted that "appellate counsel's failure to perform duties necessary *to prosecute* an appeal is a denial of due process" and "[t]hus appellate counsel's failure to obtain an extension of time . . . on appeal denied [the appellant] due process of law." *Id.*, at 1150; (emphasis in original). Judge Jones emphasized that "[s]uch a ruling will not have a unduly burdensome effect on the administration of state appellate courts." *Id. See: Cleaver* v. *Bordenkircher*, 634 F.2d 1010 (6th Cir. 1980), *cert. denied sub nom, Sowders* v. *Cleaver*, 451 U.S. 908 (1981), where federal habeas corpus relief was granted because the petitioner "ha[d] been deprived of his right to appeal his conviction solely because his indigency status made the overburdened public defender his only source of legal representation" in violation of both the equal protection clause and the due process clause of the federal constitution.

The respondent has reviewed case decisions from every federal circuit and has discovered that the courts are unanimous in concluding, contrary to the position of the petitioners, that the due process right to effective assistance of counsel applies to appellate counsel. In an effort to avoid extensive repetitive argument, the respondent has attached as Appendix "A" to this brief a listing of those cases.

c. State Courts[9]

In addition to the federal courts, state courts, apparently without exception, support respondent's position. In *Shipman* v. *Gladden*, Ore., 453 P.2d 921 (1969), the appellant's counsel failed to file a timely notice of appeal. As a result, Mr. Shipman lost his right to appeal to the Oregon Supreme Court. However, the court, *en banc*, affirmed the granting of his motion for a belated appeal, stating:

> We hold that because of the culpable negligence of his counsel petitioner was deprived of his Fourteenth Amendment right to due process. *Since the state's criminal process would be found lacking in fundamental fairness if it permitted the deprivation of appellate review by the culpable neglect of counsel, the state must provide a remedy adequate to restore the impaired right. Id.*, a 927; (emphasis added).

In *McAuliffe* v. *Rutledge*, 231 Ga. 745, 204 S.E.2d 141 (1974), the Supreme Court of Georgia examined a situation where an appeal was dismissed due to the failure of counsel to obtain a timely extension of time for filing the transcript on appeal. In holding that this inaction constituted ineffective assistance of counsel, the court stated:

> An attorney who through negligence, ignorance, or misinterpretation of the law as contended here, fails to perform routine duties resulting in a dismissal of his client's appeal thereby denying such client a right

[9] In determining the minimal requirements of the federal constitutional right to due process of law, it is unquestionably helpful to review the policies of the various states on the question of effective assistance of appellate counsel. This Court has previously endorsed surveying the views of the states on a particular topic to assist in fleshing out the mandate of the Fourteenth Amendment. *In Re Winship*, 397 U.S. 358, 374 (1970).

> of review after conviction cannot be said to be rendering effective assistance. The result is the same as no assistance at all. Whether counsel was retained, as here, or appointed by the court, is immaterial. *Id.*, 204 S.E.2d at 142.

The Court of Appeals of Maryland in *Wilson* v. *State*, Md., 399 A.2d 256 (1979), reached a similar result when analyzing the exact issue present in the case at bar:

> *Entitlement to assistance of counsel would be hollow indeed unless the assistance were required to be effective. It follows that a criminal has the right to the effective assistance of counsel on the direct appeal of the judgment entered upon his conviction of a serious crime. Id.*, at 260.

Interestingly enough, the Kentucky Court of Appeals has seemingly recognized that a defendant has the right to effective assistance of counsel on appeal. *See: Blankenship* v. *Commonwealth*, *supra*, at 901; *Lomax* v. *Commonwealth*, Ky. App., 581 S.W.2d 27 (1979). Similarly, the Supreme Court of Kentucky has recently acknowledged that factors "such as overwork" could "result in ineffective assistance of counsel *at the appellate level.*" *Stahl* v. *Commonwealth*, Ky., 613 S.W.2d 617, 618 (1981); (emphasis added).

Once again, the respondent, in an effect to avoid repetition, has attached a survey of the various states decisions which have concluded that there is a due process right to effective assistance of appellate counsel. *See:* Appendix "B". All recognize that a defendant cannot be denied his right to appeal due to error by his appellate counsel.

4. The Kentucky Appellate Court Applied A Misplaced Sanction In Dismissing Respondent's Appeal Due To Appellate Counsel's Failure To Comply With Procedural Requirements

The respondent cannot quible with petitioners' analysis that at least forty-three (43) states and the District of Columbia provide in their rules of appellate procedure for the dismissal of appeals (Brief for Petitioners, pp. 37-39). There is no question that procedural rules are necessary and, indeed, imperative to the orderly and expeditious processing of appeals. To clarify, the respondent is *not* challenging the authority of the states to dismiss appeals for procedural violations.

However, in the present case, the Kentucky court's sanction was misplaced. The Court of Appeals of Kentucky denied the respondent a valid constitutional right as punishment for *his counsel's failure*. Certainly, this is a denial of fundamental fairness. If the Kentucky Court of Appeals was of the opinion that petitioner's counsel engaged in unprofessional and dilatroy tactics, sanctions against counsel would have been proper. *United States* v. *Hayes*, 378 F.2d 567, 568 (4th Cir. 1967); *United States* v. *Smith*, 436 F.2d 1130 (9th Cir. 1970). *See Barry* v. *State*, Fla. App., 324 So.2d 95 (1975); *In Re Radigan*, Ky., 660 S.W.2d 673 (1983). However, regardless of the appellate counsel's performance of his duties (or lack thereof), "[t]he consequences of his lawyer's failure should not be visited upon [the respondent] in the form of his loss of his right to appeal . . ." *United States* v. *Hayes*, *supra*, at 568.

The Fifth Circuit in *Flanagan* v. *Henderson*, 496 F.2d 1274 (5th Cir. 1973), recognized that any sanction for failure to comply with procedural rules must be applied

against the negligent attorney and not the criminal defendant:

> When a court discovers that an attorney has been derelict in the performance of a court duty which could forfeit a legal right accorded to a defendant in a criminal case as significant as the right to an appeal on the merits, disciplinary measures against the attorney—rather than deprivation of the defendant's rights—may be the only constitutional remedy. *Id.*, at 1278.

The Court of Criminal Appeals of Texas in *Guillory* v. *State*, Tex., 557 S.W.2d 118 (1977), addressed this same issue and specified those measures which could be utilized to guarantee that the appellate's rights would be protected:

> As has been stated above, the trial court also has the duty to provide an indigent defendant with the effective assistance of counsel on appeal. This asistance, however, cannot be afforded without requiring that counsel file a brief in an appellant's behalf. The trial judge has the authority to require appointed counsel to file a brief in appellant's behalf. Luna v. State, 527 S.W.2d 548 (Tex.Cr.App. 1975). If a court-appointed attorney fails to file a brief within the time provided by Art. 40.09(9) and fails to request an extension of time from this Court under Art. 40.09(16), the trial court still has the authority to require appointed counsel to file a brief in appellant's behalf. There are many ways for the trial court to file a brief in appellant's behalf. There are many ways for the trial court to exercise this authority. Upon learning that no brief has been filed in appellant's behalf under Art. 40.09(9), the trial court can issue an order commanding court-appointed counsel to file a brief within a specified period of time. If no brief is filed within that time, the trial court can issue another order requiring counsel to show cause as to why he should not be held in contempt. See Art. 1911a, supra. The trial court can also report counsel to the appropriate

> grievance committee for disciplinary action. In the alternative, the trial judge can relieve an appointed attorney who has not fulfilled his duties to his client and appoint an attorney who will act as an advocate to represent the indigent on appeal. The trial judge can also see to it that recalcitrant attorneys receive no further appointments to represent indigents in his court. *Id.*, at 121.

The Superior Court of Pennsylvania in *Commonwealth* v. *Parker*, Pa. Super, 422 A.2d 509 (1980), demonstrated how the rights of a defendant can be balanced with the necessity for an orderly processing of appeals. In the cited case the appellate attorney had been ordered to file a brief within thirty (30) days. However, the attorney failed to either file a brief or provide any explanation for his failure to do so. The court concluded:

> The lack of counsel's action requires us to quash appellant's appeal. We also find appellant to have been rendered ineffective assistance of counsel and therefore entitled to new appellate counsel. Accordingly, the case is remanded to the lower court for the appointment of new counsel within 30 days of this order. Appellant shall then have the right to appeal, nunc pro tunc, within an additional 30 days of that appointment. *Id.*, at 509-510.

In *Carter* v. *City of Memphis, Tennessee*, 636 F.2d 149 (6th Cir. 1980), the Sixth Circuit focused on the issue of whether the dismissal of a civil action at the trial level is appropriate where the neglect is solely the fault of the attorney for the plaintiff. The *Carter* court explained that "[t]he dismissal of an action for an attorney's failure to comply is a harsh sanction which the court should order only in extreme situations showing 'a clear record of delay or contumacious conduct by the [client].'" *Carter* v. *City of Memphis, Tennessee, supra*, at 161. "Absent this showing an order of dismissal is an abuse of discretion; the

court is limited to lesser sanctions to achieve compliance." *Id.*

Although cast in a slightly different factual context, the legal analysis of the *Carter* court is appropriate to the case at bar. "Dismissal is usually inappropriate where the neglect is solely the fault of the attorney." *Id.*

One further point should be noted. The discretionary penalty of RAP 1.260(b)[11] which permits dismissal of an appeal for failure to comply with procedural rules should not be used as a vehicle for preventing a convicted criminal defendant from obtaining appellate review of his conviction—especially under the facts and circumstances of the respondent's case. As discussed previously at pp. 9-10, there has never been an appellate decision by either the Court of Appeals of Kentucky or the Supreme Court of Kentucky that has indicated that a Statement is jurisdictional in nature. Additionally, as argued by respondent's appellate counsel to the Court of Appeals of Kentucky (J.A., pp. 38a-40a), all of the information required to be in the Statement of Appeal was contained in the brief filed on September 12, 1977.

In *Henry* v. *Mississippi*, 379 U.S. 433 (1965), the Court explained that:

> [A] litigant's procedural default in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest. . . . If it does not, the state procedural rule ought not be permitted to bar vindication of important federal rights. *Id.*, 379 U.S. at 447-448.

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[11] Now Kentucky Rules of Civil Procedure (CR) 76.12(8)(b) and 76.34(6)(a).

Because respondent's counsel explained the reason for his procedural error and since he made a "good faith" effort to comply with the rules, the forfeiture under RAP 1.260(b) of respondent's right to appeal could serve no legitimate state interest. *See Parrot* v. *City of Tallahassee, Florida*, 381 U.S. 129 (1965); *James* v. *Kentucky*, ___ U.S. ___, 52 U.S.L.W. 4473 (1984).

In *Gilbert* v. *Sounders*, *supra*, the Sixth Circuit examined a situation highly analogous to that encountered by the respondent. In the cited case, Gilbert's appellate counsel filed a timely motion for an extension of time to certify the record on appeal. However, the order of the trial court granting the extension was not timely docketed by the clerk. Upon motion of the Commonwealth, the Supreme Court of Kentucky dismissed Gilbert's appeal. *Id.*, at 1148. In examining this situation, the Sixth Circuit recognized that "Kentucky has, of course, a right to enforce its own rules of procedure," but concluded that "the motions for reconsideration of the dismissal of the appeal was arbitrary and capricious, and an abuse of due process of law, as protected by the United States Constitution." *Id.*, at 1147. The Court noted that "[b]y these motions the [Kentucky] Supreme Court had been fully advised as to the obviously sincere attempt to perfect an appeal . . ." *Id.*, at 1146.

Similarly, the respondent has, since 1977, attempted to obtain appellate review of his conviction in the Madison Circuit Court. He should not be denied that right because of a procedural mistake made by his appellate attorney. In any event, the respondent submits that his right to appeal his conviction outweighs the state's interest in maintaining internal records of appeals.

5. The Fact That The Respondent Has Never Indicated A Waiver Of His Appellate Rights Is A Factor To Be Considered.

The record clearly reveals that since his conviction in March of 1977, the respondent has indicated an unswerving desire to appeal his case. Following the dismissal of his original appeal in January of 1978, respondent sought, under then-established Kentucky law, to have a belated appeal. Of course, these efforts, in both the Supreme Court of Kentucky and the trial court, were unsuccessful. Consistently, respondent has sought the aid of the federal courts in his attempt to have his conviction reviewed on the merits by the Kentucky appellate courts. It is significant that respondent has never shown a willingness to waive his right to appeal.

Petitioners, however, have taken the position that the respondent is bound by the actions taken by his appellate counsel. Specifically, petitioners contend that this Court's decision in *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), mandates that the federal courts should defer to the Kentucky appellate court's dismissal of the respondent's direct appeal because of the procedural error of counsel:

> In reality, this Court effectively approves dismissal of state appeals based upon failure to follow procedural rules but it does so in a different context where the default by counsel occurs not in the appellate court but in the trial court. This is where trial counsel fails to preserve a claim of error for appellate review by failing to comply with a state's contemporaneous objection rule. Thus, the refusal of the state appellate court to review an issue not preserved at trial is in practical effect a dismissal of the appeal for that one issue. This Court defers to such "dismissal" even as to a constitutional claim simply out of respect for state procedures and the valid and important policy

> reasons served thereby, and itself will not intervene except in very extreme circumstances, Wainwright v. Sykes, 433 U.S. 72 (1977). (Brief for Petitioners, pp. 32-33).

Petitioners' analysis contains one fatal flaw—they have failed to differentiate between the responsibility of trial counsel to preserve trial errors and the responsibility of the defendant to decide whether to appeal a conviction. In his concurring opinion in *Wainwright*. Mr. Chief Justice Burger noted this difference. Speaking to the obligation of trial counsel, it was stated:

> Once counsel is appointed, the day-to-day conduct of the defense rests with the attorney. He, not the client, has the immediate-and-ultimate-responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop. Not only do these decisions rest with the attorney, but such decisions must, as a practical matter, be made without consulting the client. *Id.*, 433 U.S. at 91.

In sharp contract, when looking at rights that are uniquely the defendant's to make, the issue is whether the defendant, not the attorney, has made a knowing and intelligent waiver:

> In Fay v. Noia, the Court applied the "deliberate bypass" standard to a case where the critical procedural decision—whether to take a criminal appeal—was entrusted to a convicted defendant . . . In giving content to the new deliberate bypass standard, Fay looked to the Court's decision in Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), a case where the defendant had been called upon to make the decision whether to request representation by counsel in his federal criminal trial. Because in both Fay and Zerbst, important right hung in the balance of the *defendant's own decision*, the Court required that a waiver impairing such

> rights be a knowing and intelligent decision by the defendant himself. *Id.*, 433 U.S. at 93; (emphasis in original)

Because the "fundamental decision" of whether to "take an appeal" is that of "the accused", *Jones* v. *Barnes*, ____ U.S. ____, 103 S.Ct. 3308, 3312 (1983), the respondent was not responsible for the actions of his appellate counsel.

The Illinois court in *People* v. *Brown*, 39 Ill. 2d 307, 235 N.E.2d 526 (1968) discussed this aspect:

> For a representative system of litigation to function, it is self-evident that under most circumstances clients must be bound by the acts of their lawyers. However, it is equally self-evident that a mechanical application of this legal proposition can lead to harsh results repugnant to commonly held notions of justice and fair play. (see Justice Black's dissent in Link v. Wabash Railroad Co.). These results can be even harsher in a criminal case than a civil one since in the latter suit the aggreived client has, in theory, a malpractice action against his attorney for damages, while in the former no attorney can restore his client's lost liberty. *Id.*, at 565.

The Fifth Circuit in *Collier* v. *Estelle*, 488 F.2d 929, 932 (5th Cir. 1974), discussed the proper legal standard to be applied to an alleged waiver of appeal:

> Waiver of the fundamental right to appeal requires knowing and intelligent participation cf. Schneckloth v. Eustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854, 868-869 (1973). Such a view is mindful of the decision in Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963) where in adumbrating the waiver standard the Supreme Court announced that "[a] choice made by counsel not participated in by the petitioner does not automatically bar relief" and that "the standard here put forth depends on the considered choice of the petition."

For these reasons, this Court should reach the same conclusion as was made by the Sixth Circuit, in *Boyd* v. *Cowan*, 519 F2d 182 (6th Cir. 1975):

> Under the circumstances of this case, there was no knowing intelligent and intentional relinquishment (see *Johnson* v. *Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)) of either appellant's right to counsel at appeal or of his right to appeal. We conclude that on the record below appellant is either entitled to have Kentucky review his trial as if on an original appeal, or to be released under a writ of habeas corpus. *Id.*, 519 F.2d at 184.

CONCLUSION

For the reasons delineated above, respondent submits that he was denied the effective assistance of appellate counsel in violation of the due process clause of the Fourteenth Amendment. Accordingly, the opinion of the Sixth Circuit must be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

FEDERAL CIRCUIT WHICH HAVE RECOGNIZED IN PUBLISHED OPINIONS THE EXISTANCE OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

D.C. CIRCUIT:

Hines v. *United States*, 237 A.2d 827 (D.C. Cir. 1968) (counsel files late notice appeal).

FIRST CIRCUIT:

Leventhal v. *Gavin*, 396 F.2d 441 (1st Cir. 1968) (counsel fails to preserve appeal).

SECOND CIRCUIT:

United States ex rel Maselli v. *Reincke*, 383 F.2d 129 (2nd Cir. 1967) (counsel fails to appeal); *United States ex rel Smith* v. *McMann*, 417 F.2d 648 (2nd Cir. 1969) (attorney fails to inform indigent of appellate rights).

THIRD CIRCUIT:

United States ex rel O'Brien v. *Maroney*, 423 F.2d 865 (3rd Cir. 1970) (counsel fails to file notice of appeal).

FOURTH CIRCUIT:

Williams v. *Coiner*, 392 F.2d 210 (4th Cir. 1968) (counsel fails to file Notice of Appeal); *Nelson* v. *Peyton*, 415 F.2d 1154 (4th Cir. 1969) (attorney fails to advise client of right to appeal); *Turner* v. *North Carolina*, 412 F.2d 486 (4th Cir. 1969) (attorney fails to preserve appeal).

FIFTH CIRCUIT:

Horsley v. *Simpson*, 400 F.2d 708 (5th Cir. 1968) (attorney fails to file Notice of Appeal); *Atilius* v. *United States*, 406 F.2d 694 (5th Cir. 1969) (counsel fails to file Notice of Appeal); *Rought* v. *Henderson*, 445 F.2d 622 (5th Cir. 1971) (attorney fails to preserve appeal); *Lumpkin* v. *Smith*, 439 F.2d 1084

(5th Cir. 1971) ((counsel fails to advise client as to right of appeal); *Hall* v. *Wainwright*, 441 F.2d 391 (5th Cir. 1971) (notice of appeal filed late); *Mosely* v. *Smith*, 470 F.2d 1320 (5th Cir. 1973) (attorney fails to file Notice of Appeal, withdraws as counsel of record); *Flanagan* v. *Henderson*, 496 F.2d 1274 (5th Cir. 1974) (counsel fails to obtain entire record on appeal); *Pressley* v. *Wainwright*, 540 F.2d 818 (5th Cir. 1976) (counsel withdraws after appeal begun, public defender doesn't substitute in time); *Cantrell* v. *Alabama*, 546 F.2d 652 (5th Cir. 1977) (attorney fails to file proper record on appeal); *Passmore* v. *Estelle*, 594 F.2d 115 (5th Cir. 1979) (one sentence brief); *Perez* v. *Wainwright*, 640 F.2d 596 (5th Cir. 1981) (failure to file Notice of Appeal).

SIXTH CIRCUIT:

Goodwin v. *Cantrell*, 432 F.2d 521 (6th Cir. 1970) (failure to advise client of right to appeal); *Henderson* v. *Cardwell*, 426 F.2d 150 (6th Cir. 1970) (counsel fails to advise client of appellate rights); *Yates* v. *Wingo*, 425 F.2d 1167 (6th Cir. 1970) (attorney fails to file Notice of Appeal); *Woodall* v. *Neil*, 444 F.2d 92 (6th Cir. 1971) (attorney abandons appeal); *Rosinski* v. *United States*, 459 F.2d 59 (6th Cir. 1972) (attorney fails to perfect appeal); *Davis* v. *United States*, 464 F.2d 1009 (6th Cir. 1972) (attorney withdraws after sentencing); *Boyd* v. *Cowan*, 494 F.2d 338 (6th Cir. 1974) and *Boyd* v. *Cowan*, 519 F.2d 182 (6th Cir. 1975) (failure to preserve appeal); *Cleaver* v. *Bordenkircher*, 634 F.2d 1010 (6th Cir. 1980) (failure to file timely brief); *Gilbert* v. *Sowders*, 646 F.2d 1146 (6th Cir. 1981) (counsel fails to file timely brief).

SEVENTH CIRCUIT:

Macon v. *Lash*, 458 F.2d 942 (7th Cir. 1972) (attorney files wrong motion; appeal dismissed).

EIGHTH CIRCUIT:

Williams v. *United States*, 402 F.2d 548 (8th Cir. 1968) (attorney fails to file Notice of Appeal); *Blanchard* v. *Brewer*,

429 F.2d 89 (8th Cir. 1970) (counsel fails to serve Notice of Appeal); *Robinson* v. *Wyrick*, 635 F.2d 757 (8th Cir. 1981) (attorney files appellate brief that doesn't comply with rules).

NINTH CIRCUIT:

Gairson v. *Cupp*, 415 F.2d 352 (9th Cir. 1969) (failure to file Notice of Appeal); *Riser* v. *Craven*, 501 F.2d 381 (9th Cir. 1974) (counsel fails to file Notice of Appeal); *High* v. *Rhay*, 519 F.2d 109 (9th Cir. 1975) (four page brief); *Miller* v. *McCarthy*, 607 F.2d 854 (9th Cir. 1979) (attorney fails to file Notice of Appeal); *Doyle* v. *United States*, 721 F.2d 1195 (9th Cir. 1983) (failure to file brief).

TENTH CIRCUIT:

Wynn v. *Page*, 369 F.2d 930 (10th Cir. 1966) (client not informed of appellate rights).

ELEVENTH CIRCUIT:

Mylar v. *Alabama*, 671 F.2d 1299 (11th Cir. 1982) (failure to file brief); *Cannon* v. *Berry*, 727 F.2d 1020 (11th Cir. 1984) (attorney fails to file brief).

APPENDIX "B"

STATE APPELLATE COURTS WHICH HAVE RECOGNIZED IN PUBLISHED OPINIONS THE EXISTANCE OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

ARKANSAS:

Surridge v. *State*, Ark, 637 S.W.2d 597 (1982) (attorney fails to prosecute appeal); *Nelson* v. *State*, Ark., 651 S.W.2d 98 (1983) (attorney fails to prosecute appeal).

CALIFORNIA:

In Re Smith, 87 Cal. Rptr. 687, 471 P.2d 8 (1970) (brief consisting of one page of legal argument); *People* v. *Barton*, 146 Cal. Rptr. 727, 579 P.2d 1043 (1978) (attorney prepares inadequate record on appeal).

DELAWARE:

Erb v. *State*, Dela., 332 A.2d 137 (1974) (counsel fails to prepare transcript and record).

FLORIDA:

Ford v. *Wainwright*, Fla. App., 415 So.2d 76 (1982) (failure to file Notice of Appeal).

GEORGIA:

McAuliffe v. *Georgia*, 231 Ga. 745, 204 S.E.2d 141 (1974) (attorney fails to file for extension of time).

HAWAII:

State v. *Erwin*, Ha., 554 P.2d 236 (1976) (counsel files a late Notice of Appeal).

ILLINOIS:

People v. *Brown*, 39 Ill.2d 307, 235 N.E.2d 562 (1968) (attorney fails to file brief); *People Jacobs*, 61 Ill. 2d 590, 338 N.E.2d

161 (1975) (attorney obtains two extensions of time to file record on appeal, but never files either record or brief); *People* v. *Aliwoli*, 60 Ill.2d 579, 328 N.E.2d 555 (1975) (counsel obtains three extensions of time to file brief on appeal, but never files brief).

IOWA:

Lopez v. *State*, Iowa App., 318 N.W.2d 807 (1982) (failure to raise reversible error in brief).

KENTUCKY:

Blankenship v. *Commonwealth*, Ky. App., 554 S.W.2d 898 (1977) (attorney fails to file timely record on appeal); *Stahl* v. *Commonwealth*, Ky., 613 S.W.2d 617 (1981) (attorney fails to file timely brief).

MARYLAND:

Wilson v. *State*, Md., 399 A.2d 256 (1979) (attorney fails to file brief).

MASSACHUSETTS:

Pires v. *Commonwealth*, Mass., 370 N.E.2d 1365 (1977) (failure to file brief).

MISSOURI

State v. *Scott*, Mo., 492 S.W.2d 168 (1973) (counsel failed to file Notice of Appeal); *Ray* v. *State*, Mo., 532 S.W.2d 478 (1975) (attorney gives client incorrect information about implications of successful appeal); *State* v. *Zweifel*, Mo. App., 615 S.W.2d 470 (1981) (attorney fails to raise issue on appeal).

NEW YORK

People v. *Gonzalez*, 47 N.Y.2d 606, 393 N.E.2d 987 (1979) (counsel files "inadequate brief").

OREGON:

Krummacher v. *Gierloff*, 290 Ore. 867, 627 P.2d 458 (1981) (attorney fails to file Notice of Appeal); *Shipman* v. *Gladden*, Ore., 453 P.2d 921 (1969) (failure to file timely Notice of Appeal).

PENNSYLVANIA:

Commonwealth v. *Wilkerson*, Pa. 416 A.2d 477 (1980) (failure to file Notice of Appeal); *Commonwealth* v. *Parker*, Pa. Super, 422 A.2d 509 (1980) (attorney fails to prosecute appeal); *Commonwealth* v. *McCandless*, Pa. Super, 447 A.2d 275 (1982) (failure to file Notice of Appeal).

SOUTH DAKOTA:

Grooms v. *State*, SD., 320 N.W.2d 149 (1982) (attorney fails to file Notice of Appeal).

TENNESSEE:

Moultrie v. *State*, Tenn., 542 S.W.2d 835 (1976) (counsel fails to file petition for certiorari to Tennessee Supreme Court).

TEXAS:

Steel v. *State*, Tex., 454 S.W.2d 486 (1970) (attorney fails to file brief); *Garza* v. *State*, Tex., 433 S.W.2d 425 (1968) (failure to file brief); *Jackson* v. *State*, Tex., 447 S.W.2d 922 (1969) (no appellate briefs filed); *Ex Parte Hill*, Tex., 528 S.W.2d 259 (1975) (failure to file brief); *Ex Parte Raley*, Tex., 528 S.W.2d 257 (1975) (retained counsel failed to file appellate brief); *Guillory* v. *Skobe*, Tex., 557 S.W.2d 118 (1977) (no transcript nor brief filed in appellate court); *Hogan* v. *State*, Tex., 572 S.W.2d 526 (1978) (no transcript of evidence nor brief filed with appellate court).

VERMONT:

In Re Ribedeau, Vt., 431 A.2d 484 (1981) (counsel files untimely Notice of Appeal).

WEST VIRGINIA:

State ex rel Bratcher v. *Cooke*, W.Va., 186 S.E2d 769 (1972) (attorney fails to file timely written Notice of Appeal); *Carter* v. *Bordenkircher*, W.Va., 226 S.E.2d 711 (1976) (counsel fails to preserve appeal); *Rhodes* v. *Leverette*, W.Va., 229 S.E.2d 136 (1977) (attorney fails to prosecute appeal).

REPLY

BRIEF

Office-Supreme Court, U.S.
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No. 83-1378

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

PAUL KAVANAUGH, Superintendent, Blackburn Correctional Complex and DAVID L. ARMSTRONG, Attorney General . . . . . Petitioners

versus

KEITH E. LUCEY . . . . . Respondent

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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Petition for Certiorari Docketed February 17, 1984.
Certiorari Granted April 23, 1984.

QUESTION PRESENTED

Did Dismissal by the Court of Appeals of Kentucky of Respondent's State Appeal, Pursuant to Neutral Procedural Rule Which Operated Neutrally Upon Appellate Counsel's Default, Violate Any Part of the Constitution of the United States?

Specifically, Is There a Constitutional Right to Appellate Counsel Or to Effective Assistance of Appellate Counsel As There Is for Trial Counsel? If So, Does Dismissal of a State Appeal Implicate Effective Assistance of Appellate Counsel Any More Than Does Dismissal of a United States Appeal?

PARTIES TO THE PROCEEDING

All the parties to this proceeding are set forth in the caption of this case.

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No. 83-1378

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

PAUL KAVANAUGH, Superintendent,
Blackburn Correctional Complex
and
DAVID L. ARMSTRONG, Attorney
General - - - - - - - *Petitioners*

v.

KEITH E. LUCEY - - - - *Respondent*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

CITATIONS TO THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW and STATEMENT OF JURISDICTION and CONSTITUTIONAL PROVISIONS INVOLVED

These matters are as presented in the brief for petitioners at pages 1-5.

STATEMENT OF THE CASE

This matter is as presented in the brief for petitioners at pages 5-10.

ARGUMENT

Dismissal by the Court of Appeals of Kentucky of Respondent's State Appeal, Pursuant to Neutral Rule Which Operated Neutrally Upon Appellate Counsel's Default, Did Not Violate Any Part of the Constitution. Specifically, There Is No Constitutional Right to Appellate Counsel or of Effective Assistance of Appellate Counsel as There Is to Trial Counsel. Dismissal of a State Appeal Does Not Implicate Effective Assistance of Appellate Counsel Any More Than Does Dismissal of a United States Appeal.

A. Respondent's Argument in Brief Contains Important Concessions, Omissions and Contradictions.

Petitioners respectfully submit that respondent's argument in brief contains important concessions, omissions and internal contradictions.

By his restatement of the question presented,[1] respondent has conceded that any right to counsel or to effective assistance of counsel on appeal, if it is to be found within the Constitution, must be applied to the states through the due process clause of the 14th Amendment. That being so, under respondent's restatement of the question, there can be no independent right to appellate counsel growing out of the Sixth Amendment itself.

The fact that respondent does not directly cite to the Sixth Amendment in his brief buttresses this observation.

[1]Respondent restates the question presented this way: "Whether the due process clause of the Fourteenth Amendment guarantees a criminal defendant the right to effective assistance of appellate counsel on his direct appeal from his conviction?"

A second concession which is apparent in respondent's restatement of the question is this. The right to counsel or effective assistance of counsel which respondent asserts, if it exists within the Constitution, is based upon 14th Amendment due process. It is not based upon 14th Amendment equal protection. Below, of course, respondent stipulated that there is no equal protection issue involved in this matter (J.A. 58a). This leads directly to a major and repeated inconsistency by respondent in his brief.

A substantial portion of his cited authority reaches decision purely upon equal protection grounds, even though he purports to argue upon due process grounds. Such equal protection authority and argument is therefore inappropriate and inapplicable and should not be considered because of his contrary stipulation in the District Court.[2] (Petitioners have identified and categorized such equal protection authority and other authority in the appendix directly at the close of this reply brief).

Respondent's most direct concession, however, goes directly to result, rather than to authoritative legal exposition. Simply stated, respondent for whatever reason has conceded within his argument that a state appellate court in fact can dismiss a state appeal without offending the Constitution in any way. Such con-

[2]Nowhere has respondent claimed that he was singled out for dismissal, or that other appellants received preferential treatment, for any reason. Petitioners' statement that Kentucky's rule of dismissal is neutral upon its face and in its operation is unchallenged.

cession is in the factual setting where the appeal is dismissed by failure of retained counsel handling the appeal to follow the rules of appellate procedure.

At page 6 of his brief, respondent states:

> There is no question that rules of appellate procedure serve a necessary and important function, and that *the states indeed have the authority to dismiss appeals for procedural violations*. However, it is equally true, as recognized by courts around the country, that less stringent sanctions than dismissal are also available.
> (emphasis added).

That respondent intended the meaning of this statement is confirmed at page 26 of his brief:

> The respondent cannot quible [sic] with petitioners' analysis that at least forty-three (43) states and the District of Columbia provide in their rules of appellate procedure for the dismissal of appeals (Brief for Petitioners, pp. 37-39). There is no question that procedural rules are necessary and, indeed, imperative to the orderly and expeditious processing of appeals. To clarify, the respondent is *not* challenging the authority of the states to dismiss appeals for procedural violations. (emphasis by respondent).

Respondent, then, has joined the states in believing there is no Constitutional prohibition to dismissing appeals.

The authority to which respondent refers, of course, is that of the Constitution.[5] Respondent's pleas elsewhere in brief that lesser sanctions than dismissal are available for use should be directed to the state court, not to this Court. The Constitution leaves "sanctions" —the terms, circumstances and conditions of appeal— entirely to the wisdom and discretion of the states, *McKane* v. *Durston*, 153 U. S. 684 (1894), *Ross* v. *Moffitt*, 417 U. S. 600 (1974). Dismissal, therefore, is of no Constitutional concern of habeas corpus courts of the United States.

As to an omission by respondent, nowhere in his brief does respondent point to the Constitutional source of the 14th Amendment right to effective assistance of counsel on appeal which he proclaims here. Yet to prevail he must show where the Constitution guarantees effective assistance of appellate counsel on state appeal. For a right to go through the 14th Amendment for application to the states, it first must exist elsewhere within the Constitution. Respondent (and the courts below) has not identified such source, and that is a flaw which reasonably cannot be overlooked.

The due process guarantee of assistance of counsel at state trial arises in the Sixth Amendment, as applied through 14th Amendment due process, *Powell* v. *Alabama*, 287 U. S. 45 (1932), *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). The Sixth Amendment, by its own literal terms, does not apply to appeal. Appeal was unknown to the Constitution upon adoption of the Sixth

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[5] The main statement of the question presented by petitioners is, "Did dismissal by the Court of Appeals of Kentucky of respondent's state appeal • • • violate any part of the Constitution of the United States?" Respondent by his concessions has answered, no, it did not violate any part of the Constitution.

(Footnote Continued on Next Page)

(Footnote Continued From Preceding Page)

Amendment, *Abney* v. *United States*, 431 U. S. 651 (1977), *Carroll* v. *United States*, 354 U. S. 394, n. 9 (1957). The Sixth Amendment applies only to trial. Appeal is not part of trial.

Respondent does not discuss or cite to the Sixth Amendment. Neither does he attempt to identify a Constitutional source of the asserted right to counsel on state appeal. The courts below also did not identify the Constitutional source of the right they proclaimed. Instead, they sought to mask this omission by citing lower court authority which itself was inapplicable, and they sought to avoid applicable no-due-process authority of this Court, as set forth in cases such as *McKane* v. *Durston* and *Ross* v. *Moffitt*, supra, and *Brown* v. *Allen*, 344 U. S. 443 (1953). These cases, and others, previously were cited by petitioners in their brief.

Ultimately, respondent argues emotionally — not Constitutionally — that counsel on appeal is important and beneficial. While appellate counsel may be important or beneficial under various personal standards, the Constitution does not vindicate personal standards. That is why, explicitly, there is no right to counsel on discretionary appeals, *Ross* v. *Moffitt*, supra, and *Wainwright* v. *Torna*, 455 U. S. 586 (1982), two opinions cited by petitioners for this point but to which respondent remained silent.

Petitioners in their main brief, at pp. 40-44, 21, showed the discretionary nature, in Constitutional terms, of appeals in Kentucky. Those appeals, as a matter of the Kentucky Constitution, are based upon

conditions and are not of absolute right. This Court, then, already has rejected the emotional argument which respondent raises here, that perceived benefit or importance will invoke Constitutional protection.

B. Analysis of Authority Cited in Respondent's Appendix to Brief.

In his Appendix "A," respondent has listed 41 opinions of the lower federal courts which he asserts recognize the existence of ineffective assistance of appellate counsel.

Petitioners' examination of this authority has found it with minor exception to be in two categories. The first category of lower federal court opinions is the group which relies upon other lower court authority without citing authority of this Court. The second category of lower court opinions is the group which cites equal protection authority of this Court for the contrary due process proposition claimed by respondent.

Since respondent has stipulated that equal protection does not exist here, his citation to and reliance upon such equal protection authority should not be considered. (These categorized cases are presented in petitioners' appendix A directly at the close of this reply brief).

In his Appendix "B," respondent has listed 38 opinions of state appellate courts which he asserts recognize the existence of ineffective assistance of appellate counsel.

Petitioners' examination of this authority has found it with minor exception to be in two categories. The first is the group of state opinions which cite to neither the Constitution nor authority of this Court for the proposition claimed by respondent. Thus, decision was reached by some other means. The second category of state opinions is the group which cites equal protection authority of this Court for the contrary due process proposition claimed by respondent.

Since respondent has stipulated that equal protection does not exist here, his citation to and reliance upon such equal protection authority should not be considered just on that ground alone. Moreover, equal protection authority gives no help to the strictly due process assertion of right which respondent presents in support of the decision below. Indeed, his cited authority simply does not show Constitutional due process entitlement. (These categorized cases are presented in petitioners' appendix B directly at the close of this reply brief).

A number of respondent's cases do not deal with appellate jurisdiction at all, as it exists in Kentucky. For example, respondent's case of *In Re Rebideau*, Vt., 431 A.2d 484 (1981), factually deals with trial jurisdiction counsel who untimely filed a motion to appeal. The court concluded that appellant was entitled to effective assistance of counsel — not of counsel on appeal but of counsel.

In Kentucky, jurisdiction leaves the trial court and settles in the appellate court upon the filing of the notice of appeal, *Hoy* v. *Newbury Homes, Inc.*, Ky.

325 S.W.2d 301, 302 (1959). So untimely notices of appeal would be chargeable, if at all, not to appellate jurisdiction counsel but to trial jurisdiction counsel.

It appears that one-fourth of respondent's cited cases involve a notice of appeal situation, in trial court jurisdiction, thereby again showing how his state authority is misapplied and Constitutionally inappropriate to the assertion he makes.

C. Respondent's "Critical Stage" Authority Is Not Well Taken and Does Not Support His Assertion.

Respondent attempts to argue that some courts have expanded the traditional definition of a critical stage of the criminal proceeding to include the appellate level, Respondent's Brief, pp. 12-13. His cited authority does not support him, however, as all the offending actions and defaults in his lower federal court and state court authority occurred in trial jurisdiction and not in appellate jurisdiction.

In *Nelson* v. *Peyton*, 415 F.2d 1154 (4th Cir. 1969), *trial* jurisdiction counsel did not inform the petitioner there of his opportunity to appeal. The court even spoke of the termination of the trial and the beginning of an appeal, thereby showing the difference between prosecution and appeal. In *Wainwright* v. *Simpson*, 360 F.2d 307 (5th Cir. 1966), *trial* counsel deliberately did not file either a motion for new trial or a notice of appeal. The court said this was the critical stage. Moreover, the court specifically found that there appellate review is an integral part of the state trial system as a matter of *Florida* law.

In *Williams* v. *United States*, 402 F. 2d 548 (9th Cir. 1968), a federal prosecution being attacked under 28 U.S.C. §2255, the critical stage was in the period following sentencing, and involved an untimely notice of appeal in *trial* jurisdiction. In *Ray* v. *State*, 532 S. W. 2d 478 (Mo. 1975), *trial* counsel gave bad advice about the consequences of a motion for new trial, which motion under *state* law was necessary to filing an appeal.

The same is true in respondent's case of *Perez* v. *Wainwright*, 640 F. 2d 596 (5th Cir. 1981). There, *trial* counsel failed to timely file notice of appeal and then made false statements to the court about the matter. The *Perez* court specifically stated, at p. 599, "No appellate court ever obtained jurisdiction of Perez's case, for no appeal was taken. His counsel's wrongful conduct occurred entirely in the trial court." Moreover, abundant and inapplicable equal protection pronouncements appear in these cases, as well. For the significance of the notice of appeal to jurisdiction in Kentucky, see *Hoy*, supra.

Upon appeal, the trial has ended and the defendant already has been converted from a person presumed innocent to one found guilty beyond a reasonable doubt, *Ross* v. *Moffitt*, supra. Additionally, the *Nelson* court erroneously concluded, or at least suggested, that appeal is part of the fact-finding process, citing *Linkletter* v. *Walker*, 381 U. S. 618, 639 (1965). Fact-finding, of course, is for the *trial* court, as *Linkletter* explicitly stated at p. 639.

Respondent in his brief simply does not come to grips with petitioners' authority that, Constitutionally,

there is no due process entitlement either to state appeal or to counsel on state appeal.

Finally, respondent at page 12 of his brief cites *Griffin* v. *Illinois*, 351 U. S. 12, 18 (1956) for the *Constitutional* proposition that where appellate review is provided a defendant by the state it becomes an "integral part of the • • • trial system for finally adjudicating the guilt or innocence of a defendant." Had respondent quoted the entire sentence, instead of deliberately leaving out one critical word, its actual non-Constitutional nature would have been apparent. The court actually said, "Appellate review has now become an integral part of the *Illinois* trial system for finally adjudicating the guilt or innocence of a defendant." (emphasis added).[4]

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[4]The entire *Griffin* statement, in context at p. 18, is:

> There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which *effectively* denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. *See, e.g., McKane* v. *Durston*, 153 U.S. 684, 687-688. But that is not to say that a State that does grant appellate review can do so in a way that *discriminates* against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations. *See Cole* v. *Arkansas*, 333 U.S. 196, 201; *Dowd* v. *United States ex rel. Cook*, 340 U.S. 206, 208; *Cochran* v. *Kansas*, 316 U.S. 255, 257; *Frank* v. *Mangum*, 237 U.S. 309, 327.

Illinois law is not binding upon Kentucky, which has chosen in its wisdom and discretion to place terms, conditions and circumstances upon its conditional grant of appeal, *McKane* v. *Durston*, *Ross* v. *Moffitt*, supra. Moreover, the dismissal here occurred in appellate jurisdiction, long after jurisdiction had left the trial court. This also is contrary to respondent's critical stage authority.

Under the Constitution, state appeal is not and never has been part of fundamental trial. The two are separated by a great gulf.

CONCLUSION

For the foregoing reasons and authority, together with the reasons and authority presented in their brief, petitioners pray that the opinion of the United States Court of Appeals for the Sixth Circuit be reversed for constitutional error upon a holding by this Court:

1. That a conditional state appeal constitutionally may be dismissed upon failure of appellate counsel to follow rules of procedure, and

2. That counsel and effective assistance of counsel upon conditional state appeal constitutionally are not required by due process or the Sixth Amendment, and

3. That habeas corpus courts of the United States have no constitutional power to inquire into the neutral enforcement of neutral state rules of appellate procedure.

Respectfully submitted,

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PROOF OF SERVICE

I, J. Gerald Henry, counsel of record for petitioners, hereby certify that three (3) copies of the foregoing Reply Brief for Petitioners were mailed by United States mail, with first class postage prepaid, to Mr. William M. Radigan, Walker & Radigan, Suite 303, Legal Arts Building, 200 South Seventh Street, Louisville, Kentucky 40202, counsel for respondent, and that all parties required to be served have been served, all on this September 17, 1984.

J. GERALD HENRY

Assistant Attorney General
Counsel of Record for Petitioners

APPENDIX

APPENDIX A

Lower federal court cases cited by respondent in his Appendix "A" for the proposition that one is entitled to effective assistance of appellate counsel, which cases rely only on other lower federal court authority.

Boyd v. *Cowan*, 494 F. 2d 338 (6th Cir. 1974); *Cantrell* v. *Alabama*, 546 F. 2d 632 (5th Cir. 1977); *Goodwin* v. *Cantrell*; 432 F. 2d 521 (6th Cir. 1970); *Hall* v. *Wainwright*, 441 F. 2d 391 (5th Cir. 1971); *Hines* v. *United States*, 237 A. 2d 827 (D.C. Cir. 1968); *Lumpkin* v. *Smith*, 439 F. 2d 1048 (5th Cir. 1971); *Manley* v. *Smith*, 470 F. 2d 1320 (5th Cir. 1973); *Perez* v. *Wainwright*, 640 F. 2d 396 (5th Cir. 1981); *Rosinski* v. *United States*, 459 F. 2d 59 (6th Cir. 1972); *Raught* v. *Henderson*, 445 F. 2d 622 (5th Cir. 1971); *Woodall* v. *Neil*, 444 F. 2d 92 (6th Cir. 1971); *Wynn* v. *Page*, 369 F. 2d 930 (10th Cir. 1966).

Lower federal court cases cited by respondent in his Appendix "A" for the proposition that one is entitled to effective assistance of appellate counsel which cases cite to equal protection authority of this Court for the due process proposition claimed.

Aillon v. *United States*, 406 F. 2d 694 (5th Cir. 1969); *Blanchard* v. *Brewer*, 429 F. 2d 89 (8th Cir. 1970); *Boyd* v. *Cowan*, 519 F. 2d 192 (6th Cir. 1975); *Cannon* v. *Berry*, 727 F. 2d 1020 (11th Cir. 1984); *Cleaver* v. *Bordenkircher*, 634 F. 2d 1010 (6th Cir. 1980); *Davis* v. *United States*, 464 F. 2d 1009 6th Cir. 1972); *Doyle* v. *United States*, 721 F. 2d 1195 (9th Cir. 1983); *Flanagan* v. *Henderson*, 496 F. 2d 1274 (5th Cir. 1974); *Gaines* v. *Cupp*, 415 F. 2d 352 (9th Cir. 1969); *Gilbert* v. *Sanders*, 646 F. 2d 1146 (6th Cir. 1981); *Henderson* v. *Cardwell*, 426 F. 2d 130 (6th Cir. 1970); *High* v. *Rhay*, 519 F. 2d 109 (9th Cir. 1975); *Horsley* v.

Simpson, 400 F. 2d 706 (5th Cir. 1968); *Macon* v. *Lash*, 456 F. 2d 942 (7th Cir. 1972); *Miller* v. *McCarthy*, 607 F. 2d 854 (9th Cir. 1979); *Myler* v. *Alabama*, 671 F. 2d 1299 (11th Cir. 1982); *Nelson* v. *Peyton*, 415 F. 2d 1154 (4th Cir. 1969); *Passmore* v. *Estelle*, 594 F. 2d 115 (5th Cir. 1979); *Pressley* v. *Wainwright*, 540 F. 2d 818 (5th Cir. 1976); *Riser* v. *Craven*, 501 F. 2d 281 (9th Cir. 1974); *Robinson* v. *Wyrick*, 635 F. 2d 757 (8th Cir. 1981); *Sevenchal* v. *Gavin*, 396 F. 2d 441 (1st Cir. 1968); *Turner* v. *North Carolina*, 412 F. 2d 466 (4th Cir. 1969); *United States ex rel. Mazelli* v. *Reincke*, 383 F. 2d 129 (2d Cir. 1967); *United States ex rel. O'Brien* v. *Maroney*, 423 F. 2d 665 (3d Cir. 1970); *United States ex rel. Smith* v. *McCann*, 417 F. 2d 646 (2d Cir. 1969); *Williams* v. *Coiner*, 392 F. 2d 210 (4th Cir. 1968); *Williams* v. *United States*, 402 F. 2d 546 (8th Cir. 1968); *Yates* v. *Wingo*, 425 F. 2d 1167 (6th Cir. 1970).

APPENDIX B

State Opinions Cited by Respondent in His Appendix "B" Which Themselves Do Not Cite to the Constitution Or to Authority of the Supreme Court of the United States on the Issue of Counsel on Appeal.

Carter v. *Bordenkircher*, 226 S. E. 2d 711 (1976); *Commonwealth* v. *McCandless*, Pa. Supr., 447 A. 2d 275 (1982); *Commonwealth* v. *Parker*, Pa. Supr., 422 A. 2d 509 (1980); *Erb* v. *State*, Del. Supr., 332 A. 2d 137 (1974); *Ex Parte Hill*, 328 S. W. 2d 259 (1975); *Ex Parte Raley*, 328 S. W. 2d 257 (1975); *Grooms* v. *State*, S. D., 320 N. W. 2d 149 (1982); *In Re Robideau*, Vt., 431 A. 2d 464 (1981); *Krumacher* v. *Gierloff*, Or., 627 P. 2d 458 (1981); *Lopez* v. *State*, Iowa App., 318 N. W. 2d 807 (1982); *McAuliffe* v. *Rutledge*, 204 S. E. 2d 141 (1974); *Moultrie* v. *State*, 542 S. W. 2d 835 (1976); *Nelson* v. *State*, Ark., 651 S. W. 2d 98 (1983); *People* v. *Jacobs*, 326 N. E. 2d 161 (1975); *Ray* v. *State*, 532 S. W. 2d 478 (1975); *Stahl* v. *Commonwealth*, Ky., 613 S. W. 2d 617 (1981); *State* v. *Scott*, 492 S. W. 2d 168 (1973); *Surridge* v. *State*, Ark., 637 S. W. 2d 597 (1982).

State Opinions Cited by Respondent in His Appendix "B" Which Themselves Cite to Equal Protection Authority of the Supreme Court of the United States on the Due Process Issue of Counsel on Appeal.

Blankenship v. *Commonwealth*, Ky., App., 554 S. W. 2d 898 (1977); *Commonwealth* v. *Wilkerson*, Pa., 416 A. 2d 477 (1980); *Garza* v. *State*, 433 S. W. 2d 428 (1968); *Guillory* v. *State*, 557 S. W. 2d 118 (1977); *Hogan* v. *State*, 572 S. W. 2d 526 (1978); *In Re Smith*, 471 P. 2d 8 (1970); *Jackson* v. *State*, 447 S. W. 2d 922 (1969); *People* v. *Aliwoli*, 328 N. E. 2d 555 (1975), citing *People* v. *Brown*, below; *People* v. *Barton*, 579 P. 2d 1043 (1978); *People* v. *Brown*,

235 N. E. 2d 562 (1968); *People* v. *Gonzalez*, 393 N. E. 987 (1979); *Pires* v. *Commonwealth*, Mass., 370 N. E. 2d 1365 (1977); *Rhodes* v. *Leverette*, 239 S. E. 2d 126 (1977); *Shipman* v. *Gladden*, Or., 453 P. 2d 921 (1969); *State ex rel. Bratcher* v. *Cooke*, 188 S. E. 2d 769 (1972); *State* v. *Erwin*, 554 P. 2d 226 (1976); *State* v. *Zweifel*, 615 S. W. 2d 470 (Mo. App. 1981); *Wilson* v. *State*, 399 A. 2d 256 (1979).

State Opinions Cited by Respondent in His Appendix "B" Which Themselves Cite to Lower Federal Courts on the Issue of Counsel on Appeal.

Ford v. *Wainwright*, Fla. App., 415 So. 2d 76 (1982).

State Opinions Cited by Respondent in His Appendix "B" Which Could Not Be Found as Cited.

Steel v. *State*, Tex., 454 S. W. 2d 486 (1970).